**83-1785**

No. 83-_____

# In the Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF OREGON,

Petitioner,

v.

UNITED STATE OF AMERICA, KLAMATH INDIAN TRIBE and BEN ADAIR, et al.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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## QUESTIONS PRESENTED

(1) Does a federal district court contravene the principles and policies of the McCarran Amendment and thereby abuse its discretion when it exercises concurrent jurisdiction to adjudicate partially water rights in a portion of a river system, while an adequate state proceeding to adjudicate all water rights in the entire river system is in progress?

(2) Does a federal appellate court's refusal to sanction a district court for abuse of discretion in exercising concurrent jurisdiction in a water rights case so contravene the controlling decisions of this Court and deprive the state and its citizens of a remedy that this Court should exercise its supervisory power to compel dismissal of the district court proceedings?

## PARTIES

The parties to the proceeding in the Ninth Circuit whose judgment is sought to be reviewed are as follows: Donovan L. Nicol, Viola Gouldin, Ellingson Lumber Company, James L. Chapman, Sandra Chapman, Edward D. Tompkins, Mabel Tompkins, Dayton O. Hyde, Gerda V. Hyde, Marion B. Pinneo, John C. Horton, Mabel Schumacher, Ehrmann Danell Guistina, Kenneth E. Emery, Dorothy Emery, Tina Kay Emery, Bruce Emergy, H. T. Bell, Dorothy G. Bell, Richard A. Myers, Donald H. Dean, Lloyds Bank of California, James B. Lawrence and Steven E. Lawrence, Ray J. Michels, Mary Ann Nicol, Lawrence J. Horton, Nicol Land & Cattle Company, Mark Edward Nicol, Dana Marie Nicol Morasch a.k.a. Dana Marie Nicol, John M. Mosby, Marilyn Mosby, Dr. Kenneth L. Tuttle, Forrest G. Downing, Lillian M. Downing, Cliff Ambers, Don Greene, Berniel Greene, Irvin M. Scott, Nevada D. Scott, Richard M. Emard, Craig Long, Linda Long, State of Oregon, United States of America and Klamath Indian Tribe.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner State of Oregon respectfully prays that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in *United States of America and Klamath Indian Tribe v. Ben Adair, et al., and the State of Oregon*, Nos. 80-3229, 80-3245, 80-3246 and 80-3257 (January 24, 1984).

## OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals as modified on denial of rehearing is reported as *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1984). In its opinion and ensuing judgment the court of appeals affirmed as modified the judgment of the United States District Court for the District of Oregon. The opinion of the district court is reported as *United States v. Adair*, 478 F. Supp. 336 (D. Or. 1979). The modified opinion of the Ninth Circuit Court of Appeals is attached as Appendix B. The opinion of the district court is attached to this petition as Appendix A.

## JURISDICTION

The original opinion of the Ninth Circuit Court of Appeals was dated and filed on November 15, 1983. The final opinion as modified on denial of rehearing was dated and filed January 24, 1984. The judgment sought to be reviewed was entered on the same

date. Jurisdiction to review the court of appeals' judgment in this civil case by writ of certiorari is conferred upon this Court by 28 U.S.C. § 1254(1). This petition for writ of certiorari is filed within the 90-day period prescribed by 28 U.S.C. § 2101(c), as computed in accordance with Rule 20 and Rule 29(1) of the Rules of the Supreme Court of the United States.

## STATUTE INVOLVED

The McCarran Amendment, 43 U.S.C. § 666, provides in pertinent part:

> "(a) Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances. . . ."

## STATEMENT OF THE CASE

### I. Introduction

Acting on a water rights suit initiated by the United States and in which the Klamath Indian

Tribe intervened, the United States District Court for Oregon exercised concurrent jurisdiction under the McCarran Amendment to adjudicate water rights in a small portion of the Klamath River System. The district court did not undertake to quantify the water rights and did not undertake a general stream adjudication. The court limited its exercise of jurisdiction to determining the priority among reserved water rights arising under federal law on lands roughly within the boundaries of the former Klamath Indian Reservation.

The district court acted while a fully adequate and more comprehensive state proceeding was in progress. The state proceeding covered not only the parties and area before the federal district court, but included the entire Klamath River system (except some areas previously adjudicated), and all persons within the system.

This case presents a classic example of a federal district court's exercise of concurrent jurisdiction in clear violation of the principles established by this Court in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 819 (1976), and in *Arizona v. San Carlos Apache Tribe*, ___ U.S. ___, 103 S.Ct. 3201, 3214-3215 (1983). Due application of those principles in an Indian water rights case

requires a federal district court to avoid an adjudication of water rights when they can be completely addressed in a pending state water rights proceeding. As discussed below, review and reversal by this Court is required to insure that the lower federal courts do not disparage the policy of the McCarran Amendment to avoid duplicative water rights litigation, unnecessary competition between federal and state forums, and unwarranted complication of property right determinations.

## II. Nature of State Proceedings to Adjudicate Water Rights

In 1909 the State of Oregon adopted a comprehensive water code that provides a system for the regulation, control, distribution, use and right to the use of water, and for determining all of the relative rights to the use of the waters of a stream or river system. 1909 Or Laws, ch. 216.[1] The Oregon adjudication procedure is summarized in Exhibit C of Appendix D.[2] It is a statutorily defined combination

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[1]On a statewide basis Oregon applies the doctrine of prior appropriation in establishing the rights to the use of water. Or. Rev. Stat. §§ 537.110, 537.120, 537.130, 537.150, 539.010. Under this doctrine one acquires a right to water by diverting it from its natural source and applying it to some beneficial use. Or. Rev. Stat. § 537.250. Continued beneficial use of the water is required in order to maintain the right. Or. Rev. Stat. §§ 537.250(2), 540.610. In periods of shortage, entitlement to water among confirmed rights is determined according to the relative date of priority. Or. Rev. Stat. §§ 537.120, 539.010.

[2]Appendix D is the affidavit of Chris Wheeler, Deputy Director of the Water Resources Department of the State of Oregon. This affidavit, with attached exhibits, was Exhibit A to the State's motion to dismiss the federal court proceedings. (C.R. 268).

of administrative and judicial proceedings. *See* Or. Rev. Stat. §§ 539.130 and 539.150, set forth at Appendix C. The end result of the Oregon adjudication procedure is a judgment of the circuit court of Oregon affirming or modifying an administrative order of the state Water Resources Director which determines and establishes the various rights to the water of a stream. Or. Rev. Stat. § 539.150(4).

**III. Statement of Facts**

The Klamath Indian Reservation was created by treaty in 1864. 16 Stat. 707 (1864). The Klamath lived in what is now Oregon, including the Klamath Marsh area, for more than one thousand years before the Treaty of 1864. *United States v. Adair*, *supra*, 478 F.Supp. at 339. Tribe members hunted, fished and gathered food from the lands they occupied. The waters of the Williamson River, a tributary of the Klamath River, were important to the Indians' lifestyle. *Id.*

The Klamath River includes the Klamath River and its tributaries.[3] It is the largest basin in Eastern Oregon in which the relative rights to appropriate water have not been adjudicated. Water users have needed a determination of relative rights to appropriate water from the Klamath River for many

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[3] *See* Exhibit B of Appendix D, which contains a map of the area showing outline of the Klamath River Basin, the area covered by the proposed federal adjudication, and the areas previously adjudicated by the water resources director. Except where noted otherwise, the information that follows is taken from Appendix D.

years.[4] Until 1976, however, the state was unable to adjudicate a significant portion of those rights because of the Klamath Termination Act of 1954. The Klamath Termination Act terminated the protection and supervision of the United States over the Klamath Indian Tribe and over individual Indians. 25 U.S.C. § 564. The Act also provided that the laws of the State of Oregon with respect to the abandonment of water rights by nonuse would not apply to the Tribe and its members until 15 years after the date of the proclamation by the Secretary of Interior. 25 U.S.C. § 564(m) and (q). That proclamation was issued on August 13, 1961 (Pretrial Order, III D 16, p. 8; C.R. 388-389). Thus, the laws of the State of Oregon governing the abandonment of water rights by nonuse had no application to the Tribe and its members until the 15-year period ended on August 13, 1976.

Although the State of Oregon was not in a position to adjudicate water rights in the Klamath

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[4]Several tributaries of the Klamath River, however, have been the subject of water rights adjudications. As of May 1976, several thousand individual water rights owners in the Klamath Basin were operating under water rights issued and regulated by the Water Resources Department. Of these, some 170 involved applications for permits or joinder in adjudications by the Federal Government on behalf of the United States Forest Service, Bureau of Indian Affairs and National Parks. In addition, there were many water rights application filings with the State of Oregon for the Klamath Basin by individual Indian allottees or their successors, and similar filings by the Bureau of Indian Affairs and the U.S. National Bank as trustee for the remaining members of the Klamath Tribe. In all, the United States has made approximately 4,000 state filings for water rights in the State of Oregon.

River System until 1976, work preparatory to that end began as early as 1973. In that year, the State Engineer installed gauging stations in a portion of the Klamath River Basin to collect part of the basic data that would be essential for the adjudication of the relative rights in the remainder of the basin. In 1974, the State Engineer prepared his budget request for submission to the 1975 legislature. The request included expenditures for proceeding with the Klamath River Basin adjudication for the 1975-1977 biennium. Plans for the Klamath adjudication were explained to Subcommittee No. 6 of the Joint Ways and Means Committee of the 1975 Oregon legislature.

On September 29, 1975, the United States and two of its agencies (the Fish and Wildlife Service and the Forest Service) filed the complaint in this case in the federal district court in Oregon. (C.R. 1). The United States sued for declaratory relief to determine and define the water rights appurtenant to the lands of the defendants and the nature of the water rights of the United States appurtenant to its lands. The suit covered that portion of the drainage of the Williamson River and its tributaries above the "reef"[5] near Kirk, Oregon. (Pretrial Order I, pp.

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[5]The "reef" is a geologic formation that constricts the flow of the Williamson River at the downstream end of the Klamath Marsh. *See United States v. Adair, supra*, 723 F.2d at 1398 n. 1.

2-3, C.R. 388-389). Most of this land was within the boundaries of the former Klamath Indian Reservation as established in 1864. A portion of the land is national forest lands adjacent to the former reservation. (Pretrial Order III B 5, p. 5; C.R. 388-389). The purpose of the suit was to determine the rights of parties with interests in the former reservation lands to use the water of the Williamson River system. *United States v. Adair, supra*, 478 F.Supp at 339.

On January 15, 1976, the Oregon Water Resources Director published notice that on September 1, 1976, he would begin an investigation of the flow and use of the waters of the Klamath River and its tributaries pursuant to Or. Rev. Stat. § 539.020, with the exception of certain portions where previous adjudications had occurred. (Exhibit 1 attached to plaintiff's Amended Memorandum in Opposition to Motions to Dismiss; C.R. 279). *See* Appendix E. The United States received the notice on April 26, 1976. (Amended Memorandum in Opposition to Motions to Dismiss, p. 3; C.R. 279).

On May 6, 1976, the State of Oregon moved to intervene and to dismiss the federal court litigation, relying on this Court's decision in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). (C.R. 267, 268). Subsequently, most of the defendants filed motions to dismiss on McCar-

ran Amendment grounds. 43 U.S.C. § 666. (C.R. at 266-277).

On September 13, 1976, the district court allowed the state's Motion to Intervene and took the various motions to dismiss under advisement. (C.R. 283). However, the court never expressly ruled on or entered an order denying the state's motion to dismiss. Instead the court adopted a pretrial order on November 2, 1977, which, by implication, denied the motions to dismiss. (C.R. 388-389). *See United States v. Adair, supra*, 723 F.2d at 1402-1403, n. 6 (setting forth comments of district court and trial counsel).

After the United States filed its complaint and until Oregon's motion to dismiss was argued on September 13, 1976, no substantive proceedings had occurred in the federal district court. *See* pp. 1-2 of Index to Clerk's Record, Documents Nos. 1 to 283.

## IV. Comparison of Federal Proceeding with State Proceeding

As earlier stated, the federal proceedings dealt primarily with lands within the former boundaries of the Klamath Indian Reservation. (Pretrial Order, III, B 5, p. 5; C.R. 388-389). The defendants in the federal proceedings are individuals, corporations, and other legal entities who own real property in the litigation area. They include Indians from the former Klamath Indian Reservation, heirs, and successors in interest to Indian allotments or to land

formerly held by the United States in trust for the Indians. (Pretrial Order, III, A 4, pp. 4-5; C.R. 388-389).

The State of Oregon was also a party defendant in its capacity as a property owner. However, the district court agreed that its judgment would not bind state officials as to decisions to be made in their adjudicative capacity and affecting the rights of persons not parties to the federal litigation. (Pretrial Order, III A 2, p. 4; XI, 8, p. 27; C.R. 388-389).

The state adjudication proceeding includes the entire Klamath River Basin to the California border excepting only the areas previously adjudicated by the state. (Exhibit B of Appendix D, C.R. 268). The state adjudication proceedings includes not only all parties to the federal litigation, but all users, numbering in the thousands, downstream of the reef of the Williamson River near Kirk, Oregon, who would be affected by the state adjudication proceeding. These downstream users were not parties to the federal litigation. *See* paragraph (w) of Wheeler affidavit. (C.R. 268, Exhibit A of Appendix D). The area adjudicated by the federal court above the reef lies entirely within the state adjudication area and furnishes approximately 11% of the total annual yield of the Klamath River Basin. *See* paragraph (L) of Wheeler affidavit in support of state's motion to

dismiss and Exhibit B to that motion. (C.R. 268, Exhibits A and D of Appendix D).

**REASONS FOR ALLOWANCE OF THE WRIT**

In derogation of Supreme Court decisions, the Ninth Circuit failed to recognize that the district court abused its discretion by exercising concurrent jurisdiction to adjudicate partially water rights in a portion of the Klamath River system when an adequate state adjudication proceeding covering the entire river system was in progress. The Ninth Circuit's refusal to sanction the district court so deprives the state and its citizens of a remedy and is such a departure from controlling decisions of this Court that this Court should exercise its supervisory power to compel dismissal of the district court proceedings.

In *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), the United States brought suit in the Colorado federal district court seeking adjudication of reserved water rights claimed on behalf of itself and certain Indian tribes, as well as rights based on state law. The suit involved certain rivers in Colorado Water Division 7. One thousand water users were named as defendants. One of the defendants filed an application in the state court for Division 7 seeking an order directing service on the United States in order to make it party to the pending water rights proceed-

ings in that division and to adjudicate its claims. The United States was served and made a party to those proceedings. Subsequently, the district court granted a motion to dismiss on abstention grounds. The court of appeals reversed. *United States v. Akin*, 504 F.2d 115 (1974). On certiorari, this Court reversed and articulated the factors a district court must take into account in determining whether or not to exercise concurrent jurisdiction.

The factors established by this Court include the desirability of avoiding piecemeal litigation, the inconvenience of the federal forum, the order in which jurisdiction was obtained by the concurrent forums and the absence of any substantive proceedings in the federal district court. *Colorado River*, *supra*, 424 U.S. at 818-820. The district courts were admonished that

> "No one factor is necessarily determinative; *a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required.* See *Landis v. North American Co.*, *supra*, [209 U.S. 248] at 254-255. Only the clearest of justifications will warrant dismissal."

424 U.S. at 819. (Emphasis added). This Court pointed out, however, that in a water rights case, the McCarran Amendment itself is an additional and "important" factor which "clearly" counsels against

concurrent federal proceedings. 424 U.S. at 819. This Court stated:

> "The clear federal policy evinced by that legislation is the avoidance of piecemeal adjudication of water rights in a river system. This policy is akin to that underlying the rule requiring that jurisdiction be yielded to the court first acquiring control of property, for the concern in such instances is with avoiding the generation of additional litigation through permitting inconsistent dispositions of property. This concern is heightened with respect to water rights, the relationships among which are highly interdependent. Indeed, we have recognized that actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings. See *Pacific Live Stock Co. v. Oregon Water Bd.*, *supra*, [241 U.S. 440] at 449. The consent to jurisdiction given by the McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights as the means for achieving these goals."

424 U.S. at 819.

These principles recently were reinforced by this Court. In *Arizona v. San Carlos Apache Tribe*, 103 S.Ct. 3201 (1983), United States district courts dismissed suits brought by Indian tribes to adjduciate Indian water rights. The district court suits were dismissed while in their infancy in deference to state water rights proceedings filed shortly after the federal suits. In upholding the district court dismissals, this Court reiterated the *Colorado River* policy, saying:

> "The McCarran Amendment, as interpreted in *Colorado River*, allows and encourages state courts to undertake the task of quantifying Indian water rights in the course of comprehensive water adjudications. Although adjudication of those rights in federal court instead might in the abstract be practical, and even wise, it will be neither practical nor wise as long as it creates the possibility of duplicative litigation, tension and controversy between the federal and state forums, hurried and pressured decisionmaking, and confusion over the disposition of property rights."

103 S.Ct. at 3214-3215.

Had the district court in this case addressed the *Colorado River* factors and done so properly, it should have dismissed the federal suit.[6] However, the district court opinion and the record itself give no indication that the court undertook the careful weighing of factors called for by this Court in *Colorado River*. No order ever was entered by the district court denying the state's motion to dismiss (C.R. 268). The district court's opinion contains no discussion or findings applying the *Colorado River* principles governing the exercise of concurrent

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[6]Many of the factors which militated against the exercise of jurisdiction in the *Colorado River* case are present in the Oregon case: The state's motion to dismiss preceded any meaningful filings in the federal court; the federal government had a history of participating in state water filings with some 4,000 state filings for water rights in the State of Oregon, including some 170 filings in the Klamath River Basin on the state side; over 600 defendants were named in the government's amended complaint. *See Colorado River*, *supra*, 424 U.S. at 819. *See also* par. (h), par. (p), par. (t). of Wheeler affidavit. (C.R. 268, Appendix D).

jurisdiction. The court merely pointed out from the bench that ". . . the factual basis of the *Colorado River* case is not present here because of the limited jurisdiction of the State and because of other differences." *United States v. Adair*, 723 F.2d at pp. 1402-1403 n. 6 (Appendix B).

Not only did the district court not state in what respect the state's jurisdiction conceivably was limited, nor explain what it meant by "other differences," it was utterly in error. This Court has recognized that Oregon's water rights adjudicatory proceeding is both comprehensive and complete. It

> "is intended to be universal and to result in a complete ascertainment of all existing rights, to the end; First, that the waters may be distributed, under public supervision, among the lawful claimants according to their respective rights without needless waste or controversy; Second, that the rights of all may be evidenced by appropriate certificates and public records, always readily accessible, and may not be dependent upon the testimony of witnesses with its recognized infirmities and uncertainties, and, Third, that the amount of surplus or unclaimed water, if any, may be ascertained and rendered available to intending appropriators."

*Pacific Live Stock Co. v. Oregon Water Bd.*, 241 U.S. 440, 448 (1916).

In exercising concurrent jurisdiction the district court ignored the policy underlying the McCarran Amendment. Where there is an adequate state procedure available, that policy ". . . allows and

encourages state courts to undertake the task of quantifying Indian water rights in the course of comprehensive water adjudication. . . ." *Arizona v. San Carlos Apache Tribe*, 103 S.Ct. at 3214-3215. Because there is a procedure in Oregon to determine comprehensively and completely the questions the district court dealt with only partially (*See Pacific Live Stock Co. v. Oregon Water Bd.*, 241 U.S. at 448), the district court should have declined to exercise concurrent jurisdiction. *Arizona v. San Carlos Apache Tribe*, 103 S.Ct. at 3215. By exercising jurisdiction the district court not only ignored the policy of the McCarran Amendment, it also violated the *Colorado River* principle by making a piecemeal and partial adjudication of a small portion of the river system which the court itself ruled was not binding on the thousands of non-parties covered by the Oregon adjudicatory proceeding. (Pretrial order, XI 8, p. 27, C.R. 388-389).

The court of appeals' decision compounded the district court's error by refusing to reverse the district court's abuse of discretion. In justifying its refusal to vacate the district court's order, the Ninth Circuit departed from the principles of *Colorado River* in three particulars.

First, the court of appeals held that the requisite "exceptional circumstances requiring dismissal" were not present. 723 F.2d at 1403. In so holding

the court ignored the policy underlying the McCarran Amendment which *requires* dismissal, all factors otherwise being equal:

> "*But the most important consideration in* Colorado River, *and the most important consideration in any federal water suit concurrent to a comprehensive state proceeding, must be the 'policy underlying the McCarran Amendment,'* [citations omitted], and, despite the strong arguments raised by the respondents, *we cannot conclude that water rights suits brought by Indians and seeking adjudication only of Indian rights should be excepted from the application of that policy or from the general principles set out in* Colorado River. In the cases before us, assuming that the state adjudications are adequate to quantify the rights at issue in the federal suits, and taking into account the McCarran Amendment policies we have just discussed, the expertise and administrative machinery available to the state courts, the infancy of the federal suits, the general judicial bias against piecemeal litigation, and the convenience to the parties, we must conclude that the District Courts were correct in deferring to the state proceedings."

*Arizona v. San Carlos Apache Tribe*, 103 S.Ct. at 3215. (Emphasis added).[7]

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[7]The Ninth Circuit itself recognized, but did not apply, the correct standard in its footnote 8, 723 F.2d at 1405, wherein it stated:

> "We realize, of course, that where both the state and the federal proceedings are in their infancy at the time of a motion to dismiss the federal proceeding, both *Colorado River* and *San Carlos Apache Tribe* indicate *that absent unusual circumstances, the federal court should defer to the state proceeding. See San Carlos Apache Tribe*, at ___ , [*sic*] 103 S.Ct. at 3213-15" (Emphasis added).

Second, the court of appeals failed to apply the *Colorado River* standard of review which requires consideration of the relevant factors as of the time of the filing of the motion to dismiss, not as of the time of appellate review. The court concluded that it should not reverse because to do so would be a waste of the district court's judicial resources. The court said:

> "Because the district court had statutory jurisdiction to act as it did, and because we believe it would be an exercise in unwise and wasteful judicial administration inconsistent with the Supreme Court's decision in *San Carlos Apache Tribe* to vacate and cast aside the district court's carefully considered judgment in these matters, we proceed to a review of the merits of the district court's decision."

723 F.2d at 1407. *See also* similar comments, 723 F.2d at 1404.

In concluding that reversal would constitute a waste of the district court's judicial resources, the Ninth Circuit did not apply the relevant *Colorado River* standard for review. That standard, set out in footnote 8 of the court of appeals opinion,[8] requires consideration of the relevant factors *as of the time of the filing of the motion to dismiss*, not as of the time of appellate review. *See Arizona v. San Carlos Apache Tribe*, 103 S.Ct. at 3215. *See also Moses H.*

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[8] *See* note 7, *supra*.

*Cone Memorial Hospital v. Mercury Construction Corporation*, 103 S.Ct. 927, 938-939 (1983) (exercise of discretion by district court is reviewable and must be exercised under the relevant standard prescribed by the Supreme Court). In effect the Ninth Circuit bootstrapped the district court's erroneous exercise of concurrent jurisdiction into a relevant factor for an appellate determination whether the district court had abused its discretion.

Third, the Ninth Circuit ignored the McCarran Amendment policy of encouraging the state courts to decide federal Indian law water rights questions. The court said:

> "The [district] court limited its determination to ordering the priority among reserved water rights arising under federal law. The district court explicitly anticipated that '[a]ctual quantification of the [reserved] rights to use of the waters of the Williamson River and its tributaries within the [federal] litigation area will be left for judicial determination, consistent with the decree in this action, by the State of Oregon under the provisions of [the McCarran Amendment].'
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> "In so limiting its exercise of jurisdiction, the district court avoided passing on questions of state water law and indeed *ruled only on those questions involving application of the federal Indian law doctrine of reserved water rights*. Far from improperly intruding on the role of the state court, we find that in exercising federal jurisdiction in this fashion the *district court coordinated its adjudication of water rights with adjudication by the state court so as to allow each forum to*

> *consider those issues most appropriate to its expertise.*"

723 F.2d at 1406. (Emphasis added). In concluding it was proper for the federal court to pass on these questions involving application of the federal Indian law doctrine of reserved water rights, the court ignored the fact that it was precisely these kinds of "Indian law" questions that the McCarran Amendment conferred jurisdiction upon the states to decide. *Arizona v. San Carlos Apache Tribe*, 103 S.Ct. at 3215.[9]

This case is particularly significant because it presents the first opportunity this Court has had to review a federal court *exercise* of concurrent jurisdiction under the McCarran Amendment which is claimed to be an abuse of discretion. Both the district court and the court of appeals assumed that the district court's "adjudication" would be of some administrative benefit to the overall process of determining the rights of the various users in the Klamath River Basin system. However, piecemeal adjudication of water rights, such as the district

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[9]The court of appeals in its opinion characterized the state's administrative proceedings as having been "stayed" during the pendency of the federal suit because the investigative process was not yet complete. 723 F.2d at 1405. The Wheeler affidavit in the owners' petition for rehearing refutes any notion of a state "stay" and makes clear the state had spent over $900,000 at the time of the petition for rehearing, had completed 60-65 percent of the field work pertaining to the use of water for which notices of intent to file claims had been submitted, had surveyed 180,000 acres of developed irrigated land in the Klamath Basin, half of which was in the Klamath project, and expected to spend another $150,000 in 1984 alone.

court undertook here, frustrates important state and federal interests. As this Court recognized in *Colorado River* and *San Carlos Apache Tribe*, the McCarran Amendment evinces an "important federal interest in allowing all water rights on a river system to be adjudicated in a single comprehensive state proceeding." *San Carlos Apache*, *supra*, 103 S.Ct. 3201 at 3205. Piecemeal adjudication is "likely to be duplicative and wasteful, generating 'additional litigation through permitting inconsistent dispostions of property.'" *Id.* at 3214. Because the district court's decision in this case bound only the relatively few parties before it and involved only a portion of a large river system, its decision likely will be duplicative, wasteful and will permit "inconsistent dispositions of property."

Moreover, the district court's exercise of jurisdiction has cast a shadow over the state's adjudicatory proceeding, the effect of which is unknown at this time. The district court's decision binds some parties to the state proceedings (those who were parties to the federal proceeding) but does not bind the vast majority of parties to the state proceedings.[10] The state adjudicatory body thus will be in the untenable

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[10]For example, the district court's determination of the priority date of water rights for irrigation and domestic purposes would not be binding on downstream users who were not parties to the federal litigation. Nor, under the pretrial order, was the federal determination on that issue binding on the state officials as to such nonparties. (Pretrial Order, XI 8, p. 27; C.R. 388-389).

position of having to apply the district court's decision as to some parties before it, but encouraged to reject the decision or at least its reasoning by other parties. Although the state adjudicatory body technically will be free to apply or not apply the district court's analsyis and decision, as modified by the Ninth Circuit, to parties and portions of the river system not involved in the federal proceedings, it may not be able do so without creating significant inconsistencies in adjudicating particularly the quantity of water rights to which persons are entitled. Thus, the lower federal courts have frustrated the congressional determination that federal courts ought to defer to state court jurisdiction in water rights adjudications which primarily involve matters of local concern and secondarily implicate federal issues which state tribunals are competent to determine.

In short, the district court abused its discretion because an adequate state proceeding was in progress to make a complete determination of the water rights the federal district court dealt with only partially. In exercising concurrent jurisdiction, the district court wholly failed to display the ". . . carefully considered judgment taking into account both the obligation to exercise jurisdiction and the

combination of factors counselling against that exercise . . ." called for in *Colorado River Water Conservation District v. United States*, 424 U.S. at 818-819. The lower court not only departed from the principles laid down by this Court in *Colorado River*, it did so without any basis in sound judicial administration. If the Ninth Circuit's decision stands unreversed, there will be no effective review of a district court's decision to exercise concurrent jurisdiction in a given case. Such nonreview would totally frustrate the policy of the McCarran Amendment, so carefully and clearly articulated by this Court in *Colorado River* and *San Carlos Apache*. Because the district court drastically departed from the approved course of judicial proceedings and because the court of appeals affirmed that departure, this Court should accept review to exercise its supervisory powers.

## CONCLUSION

For the reasons advanced, this Court should grant the petition for certiorari and reverse the

judgment of the court below with instructions to effect dismissal of the district court proceeding.

Respectfully submitted,

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## APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

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| UNITED STATES, Plaintiff, | ) | |
| and | ) | |
| KLAMATH INDIAN TRIBE, | ) | Civil No. 75-914 |
| Plaintiff-Intervenor, | ) | |
| vs. | ) | OPINION |
| BEN ADAIR, et al., | ) | |
| Defendants, | ) | |
| THE STATE OF OREGON, | ) | |
| Defendant-Intervenor. | ) | |

[Names of counsel omitted in printing]

SOLOMON, Judge:

In 1864, by treaty with the Klamath and Modoc Indians (Indians), the United States created the Klamath Indian Reservation (Reservation) in south central Oregon, where the Indians had lived and maintained a hunting, fishing, and gathering economy for more than a thousand years. From time to time, the Federal Government (Government) allotted parcels of Reservation land to individual Indians. Some allottees sold or leased their land to

private persons, both Indian and non-Indian.

After 1864, the Government and the Indians began irrigating the Reservation to develop agriculture.

On August 13, 1954, Congress enacted the Klamath Termination Act, 68 Stat. 718, which terminated the Reservation. By 1973, all land which the Indians had held in common was either sold to private persons or acquired by the Government for national forest or wildlife refuge purposes.

This case concerns conflicting claims to water rights. The Government and two of its agencies (the Fish and Wildlife Service and the Forest Service) brought this action to determine the rights of parties with interests in the former Reservation lands to use the waters of the Williamson River system (River).

The Klamath Indians have lived for more than a thousand years in an area of south central Oregon east of the Cascade Mountains which includes the Klamath Marsh (Marsh). The largest settlement of Klamath Indians was located along the Williamson River in the vicinity of the Marsh.

Historically, the Klamath Indians depended on the Marsh and its surrounding rivers, lakes, and forests for food. There they fished, hunted waterfowl and game, and gathered edible plants. The Indians also depended on the area for clothing and building materials.

Even now, hunting, fishing, and gathering in the area are important to the Klamath Indians.

On October 14, 1864, the Klamath Indians entered into a treaty with the United States. Under the Treaty, the Indians ceded their interest in more than 12 million acres of land to the United States. In return, the Government reserved 768,000 acres from the public domain and created the Reservation for exclusive occupation by the Indians.

Article I of the Treaty reserved to the Indians "the exclusive right of taking fish in the streams and lakes [of the Reservation], and gathering edible roots, seeds, and berries within its limits."

Under Article II, the government agreed to pay $80,000 during a period of 15 years to "promote the well-being of the Indians, advance them in civilization, and especially agriculture, and . . . secure their moral improvement and education."

The Government also agreed to make additional payments for personnel and materials needed to farm the Reservation lands.

The Treaty protected the Indians' right to pursue their traditional culture and means of livelihood while encouraging them to develop agriculture.

After October 14, 1864, the Government held legal title to the Reservation lands for the benefit of the Indians. From time to time, the Secretary of the Interior allotted parts of the Reservation to individu-

al Indians. Many of the allotments were later sold or leased as pasture, often to non-Indians.

After 1864, the Bureau of Indian Affairs and the United States Irrigation Service, along with individual Indians, began to develop irrigation systems on Reservation land to promote livestock grazing.

In 1918, the Government claimed an undermined amount of water from the Williamson River system to irrigate approximately 73,000 acres in the Klamath Marsh area.

By 1953, more than a third of the 668 Klamath Indian families living on the Reservation supported themselves by agriculture.

In 1954, Congress terminated the Reservation. The Government agreed to purchase the interests in the Reservation lands of any Indian who chose to withdraw from enrollment in the Klamath Tribe. 78% (1,659 out of 2,113) withdrew. To pay them, the Government sold a large part of the Reservation lands. Title to the rest of the Reservation was transferred to the United States National Bank of Oregon (Bank), a private trustee, to hold and manage for the 474 Indians who chose to stay enrolled in the Tribe.

In 1961, the Government ended its supervision over the Tribe. Thereafter, with only a few exceptions, state and federal law applied to the Tribe and

its members in the same way as to other citizens of Oregon.

In 1973, the Government acquired by condemnation most of the tribal land then held by the United States National Bank of Oregon. The rest of the trust land was sold to private persons. The trust is now in liquidation.

The Klamath Tribe no longer owns any land within the area involved in this action.

*Forest Lands.*

Beginning in 1894, the Government withdrew from the public domain parcels of land adjacent to the Reservation and within the watershed of the Williamson River. The Government reserved these lands as national forest. The waters of the Williamson River system are needed to maintain and preserve the forest.

In August 1958, to extend the Winema National Forest, the Government purchased the Indian interest in part of the forest lands on the Reservation itself. In 1973, the Government acquired by condemnation other forest lands on the Reservation which it added to the Winema National Forest.

*Wildlife Refuge.*

In 1960, the Government purchased the Indian interest in approximately 15,000 acres of the Klamath Marsh. The Government reserved this land from the public domain and created the Klamath

National Wildlife Refuge (Refuge). The rest of the Marsh is now in private ownership.

The Fish and Wildlife Service has a duty to maintain and develop the Refuge as an inviolate migratory-bird sanctuary.[1]

The Fish and Wildlife Service wants to maintain the Refuge in its historic natural state, as wetlands to provide optimal conditions for wildlife and, in particular, for migratory birds.

*Agricultural Lands.*

The private parties to this action use most of this land for agriculture, and especially for cattle grazing. All of this land was originally part of the Reservation, and all private owners, both Indian and non-Indian, derive their title from conveyances by the Tribe or by individual Indian allottees.

*Present state of the Marsh.*

Much less water now reaches the Marsh than it did 75 years ago. Large areas of the Marsh have dried up. The number of migratory birds which use the Marsh has declined.

As the Marsh dries up, vegetation harmful to the growth of wildlife spreads. This leads to the further decline in the Marsh's capacity to support wildlife. Only about 10% of the Refuge is now open water. 75 years ago the proportion was 50%. A 50/50 balance

[1]Act of August 23, 1958, 72 Stat. 816; § 4, Act of March 16, 1934, 48 Sat. 451.

is necessary to encourage the growth of animals and desirable vegetation. Unless the process is reversed, the Refuge will become meadowland unsuitable for waterfowl nesting, and will no longer serve its intended purpose as a wildlife refuge.

*The Government Contends*:

1. When the Reservation was created, the Indians reserved their rights to use as much water as they needed to fulfill the purposes of the Reservation. *Winters v. United States*, 207 U.S. 564 (1908); *Arizona v. California* 373 U.S. 546 (1963).

Here, the Government asserts that one of the purposes of the Klamath Reservation was to protect the Indians' traditional use of the Marsh and the forests in the Reservation. The Government asserts that this purpose cannot be fulfilled unless enough water flows through the Marsh to maintain it as wetlands, and flows through the forests to provide the Indians' traditional resources on a sustained-yield basis. The Government asks for a declaration that since 1864 no one has been entitled to divert or appropriate water from the River, if the diversion or appropriation would threaten the Marsh and forests.

2. When the Government purchased parts of the Marsh and Reservation forest lands in 1960 to create the Refuge and to extend the Winema National Forest, it acquired the Indians' rights to use as much water as necessary to maintain the Marsh as a

natural wetlands, and to ensure that the forest could be used on a sustained-yield basis.

From 1864 to 1960, the Government held legal title to the Reservation for the benefit of the Indians. In 1960, in connection with the termination of the Tribe, the Government bought the Indians' beneficial interests in approximately 15,000 acres of the Marsh to create a migratory bird refuge.[2] The Government also bought the Indians' beneficial interest in most of the Reservation forest lands to extend the Winema National Forest.

In support of its second contention, the Government relies on the rule that when land is sold, appurtenant water rights pass with the land, unless a contrary intent is shown. The Government asserts that, in enacting the 1958 Act, Congress intended it to acquire the Refuge lands and the Indians' right to enough water from the River to keep the land in a natural wetlands state, and to ensure that the forest resources used by the Indians could continue to be used on a sustained-yield basis. The Government also claims it has the same water rights as the Indians because it uses the Marsh and forest lands in the same way that the Indians did before 1960.

3. When the Government acquired another part of the Klamath Indian forest lands in 1973 to extend

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[2]Act of August 23, 1958, 72 Stat. 816, as amended, 73 State. 477, 25 U.S.C. § 564w.

the Winema National Forest, it obtained the Indians' appurtenant water rights.

When the Reservation was terminated in 1954, the Government transferred legal title to these forest lands to the Bank, as a private trustee. The Bank managed the forest for the Indians who elected to remain in the Tribe. The Government asserts that the parties to the conveyance intended appurtenant water rights to pass with the land and to be held for the benefit of the Indians. The Government contends that when Congress authorized condemnation of the land in 1973 to add to the Winema National Forest,[3] Congress intended the Government to acquire any appurtenant water rights needed to maintain the land as a national forest.

The Government also contends that it enjoys the same rights to the water for this land as the Indians enjoyed, because the Government administered it for the Indians before 1973.

4. When the Government withdrew forest land adjacent to, but not a part of the Reservation in 1893, 1906, 1907, and 1930 for use as national forest, it reserved rights to use as much unappropriated water as necessary to fulfill the purposes of the national forest.

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[3]Act of August 16, 1973, 87 Sat. 349, 25 USC § 564 w-2.

To support this contention, the Government asserts that when the United States withdraws land from the public domain for a particular purpose, it generally reserves a right to use water necessary to fulfill the purpose of withdrawing the land. The Government relies on *Arizona v. Californai*, *supra*, and *Cappaert v. United States*, 426 U.S. 128 (1976), for its assertion that the priority date of this water right is the date the land was withdrawn.

5. The Government holds water rights in the Refuge and Winema National Forest necessary to protect the Indians' hunting and fishing rights.

By the Klamath Termination Act of 1954, Congress reserved the Indians' Treaty hunting, fishing and gathering rights and intended to maintain and protect fish and wildlife habitats on the land, because hunting and fishing rights are worthless without sufficient game, fish, and edible plants on the land. The prohibition of hunting within the Refuge is irrelevant, because proper maintenance of the Refuge ensures that sufficient wildlife will be available outside the Refuge where Indians may hunt.

6. The Government makes the following additional contentions on the water rights of private persons who acquired Reservation land:

> First, individual Indian allottees or Indian purchasers acquired the appurtenant water rights which the Treaty reserved to the Indians in 1864.

*United States v. Powers*, 305 U.S. 527 (1939); *Arizona v. California, supra.*

Second, non-Indian purchasers of Indian land also obtained reserved water rights with an 1864 priority date, but their rights are subject to loss by non-use or abandonment. Non-Indian purchasers are entitled to only as much water (1) as their Indian predecessors actually used for irrigation and domestic purposes when the land was conveyed, *and* (2) as the non-Indian purchaser "might with reasonable diligence place under irrigation." *United States v. Hibner*, 27 F.2d 909 (D.C. Idaho 1928). After the "reasonable diligence" period, the non-Indian purchasers are subject to the doctrine of prior appropiation.

Under the Government's argument, if an Indian allottee never diverted water for farming or domestic use, the water rights of his non-Indian successor would depend wholly on the doctrine of prior appropriation.

7. The Government asks the District Court to retain jurisdiction after it enters a declaratory decree so that State action to implement the decree may be reviewed.

The Pre-Trial Order provides that the declaration will not bind "state officials as to decisions made in their official capacity affecting the rights or interests of non-parties to this litigation." The Government fears that state officials may take action

which is inconsistent with the Court's declaration and adverse to the Government's declared rights. The Government therefore asks this court to retain jurisdiction.

8. Finally, the Government denies the defendant's contention that the Klamath River Compact is relevant to this action. The Compact is the agreement between Oregon and California for the division of Klamath River water between those states.

The United States is not a party to the Compact. The Government submits (a) that it cannot be bound by the Compact, but (b) that even if bound, the Compact is irrelevant here because this action involves a small amount of Klamath River water, and the exercise of the Government's rights would have no effect on the flow of water downstream to California. The Pre-Trial Order provides that this action will not decide the rights of any downstream user, state agencies included.

*The Klamath Tribe contends*:

1. It is entitled to enough River water to preserve the Marsh as a suitable wetlands habitat for fish and wildlife.

Under the Treaty, the Tribe reserved the exclusive right to hunt and fish on the Reservation. By reason of this reservation, the Tribe asserts that it reserved to itself as much water as it needed to

fulfill the purposes of the Reservation, including the preservation of hunting and fishing rights. *United States v. Winters*, *supra.*; *United States v. Walker River Irrigation District*, 104 F.2d 334 (9th Cir. 1939); *United States v. Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956). Under *Winters*, Indian water rights prevail over any conflicting claims by other parties, including the United States and the State of Oregon, and the determination of Indian water rights is not subject to a balancing of interests.

2. The priority date of the Indians' hunting and fishing rights, and of the water rights needed to preserve hunting and fishing, is time immemorail.[4]

Indians have fished and hunted on the Reservation lands since time immemorial, and under the Oregon Territorial Act of 1848, 9 Stat. 323, the federal government recognized the Indians' rights to occupy and use these lands.

The 1864 Treaty confirmed their pre-existing rights to hunt and fish. In *United States v. Winans*, 198 U.S. 371 (1905), the Court stated that the treaty right of taking fish "was not a grant of right to the Indians, but a reservation of rights already possessed and not granted away by them."

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[4]This contention is limited to hunting and fishing rights. The Tribe does not assert that Indian irrigation rights date from time immemorial.

3. A non-Indian purchaser of Indian land is entitled to use a share of Tribal water only to the extent that his Indian predecessor actually used the water.

In making this contention, the Tribe concedes that *United States v. Ahtanum Irrigation District*, *supra.*, is against them, but the Tribe argues that the 9th Circuit Court "adopted this position without the benefit of argument on the issue by the parties."

4. The Klamath Termination Act of 1954, which expressly preserved the Tribe's Treaty hunting and fishing rights, gave the Tribe implied rights to have enough water flow through the Reservation lands to preserve them as suitable habitat for fish and wildlife.

*The State of Oregon contends*:

1. No water rights attach to Indian hunting and fishing rights.

Like the individual landowner defendants, Oregon asserts that water rights are appurtenant to land, that a person cannot have water rights without a possessory interest in land, and that the Klamath Tribe does not have water rights because it no longer owns any land.

2. This court should not declare Indian water rights; it should let the Indians pursue ordinary tort remedies if any party interferes with their hunting and fishing right by appropriating water.

3. The Tribe lacks standing to assert the hunting and fishing rights of its members.

4. The doctrine that when the Government withdraws land from the public domain for a particular purpose, it impliedly reserves water needed to fulfill that purpose, as enunciated in *United States v. Winters*, *supra*, applies only to land reserved from the public domain, and not to land acquired by purchase or condemnation.

Specifically, Oregon asserts that the Government cannot claim *Winters* doctrine water rights either for the Refuge or for the forest lands which were part of the Reservation, because the Government acquired those lands by purchase or condemnation.

5. Oregon is entitled to Indian water rights appurtenant to Reservation land which Oregon acquired from Indian allottees, subject only to loss of those rights by abandonment. Oregon claims an 1864 priority date for these rights.

6. Oregon owns 92,000 acres of former Reservation land along with all appurtenant water rights, except those which it may have abandoned to the public.

*The individual landowners contend*:

They are entitled to the water rights which were reserved to the Indians by the Treaty with a priority date of 1864. *United States v. Powers*, *supra*; *Arizona v. California*, *supra*; *United States v.*

*Ahtanun Irrig. Distr., supra*; *United States v. Hibner, supra.*

*The individual landowners, in reply to the Government's claims and contentions, assert*:

1. The Government is not entitled to an 1864 priority date for its water rights on the Refuge because the Government did not acquire beneficial title to the Refuge lands until 1960.

2. The *Winters*, doctrine is not applicable to all Government land in this action, regardless of how acquired. The *Winters* doctrine applies only to land reserved from the public domain and which was never in private or State ownership. When the Government acquires land by purchase or condemnation, it gets only those water rights which are appurtenant to and pass with the conveyance of the land. Additional water rights can be acquired only in accordance with State law.

3. The Government when it set lands aside as a national forest outside the Reservation did not reserve water for fish conservation and recreational purposes; the Government's water rights on these lands are strictly limited under *United States v. New Mexico*, 438 U.S. 696 (1978).

4. The Klamath River Compact binds the United States and governs future acquisition of water rights by all parties to this action.

5. This court should not retain jurisdiction after it enters a declaratory judgment; the State court is the proper forum for the handling of all subsequent matters.

*In reply to the Klamath Tribe's claims and contentions, the individual landowners assert*:

1. The Tribe has no water rights, because it does not own any land within the relevant area.

Water rights are always appurtenant to land.

When the Tribe disposed of its land, the Tribe and its members lost their water rights, even though, under *Kimball v. Callahan*, 590 F.2d 768 (9th Cir. 1979), they retained their hunting and fishing rights.

2. The right to hunt and fish on public land does not entitle the Indians to require other parties to preserve public land as a suitable habitat for fish and wildlife. Congress never intended to impress the former Reservation lands with a "wilderness servitude."

3. *Kimball v. Callahan*, was wrongly decided. The Tribe has no hunting and fishing rights and lacks standing to assert those rights on behalf of its members.

*Issues.*

1. Should this court exercise jurisdiction to declare the water rights of the parties?

2. What rights are the Indians entitled to on the former Reservation:

(a) hunting and fishing rights;

(b) water rights;

(c) individual rights;

(d) tribal rights;

(e) does the Tribe have standing to assert rights on behalf of individual Indians?

3. What are the water rights of the Government for:

(a) the wildlife refuge;

(b) the forest lands within the former Reservation;

(c) the forest lands outside the former Reservation?

4. What water rights are non-Indian landowner defendants entitled to?

5. What water rights is the State of Oregon entitled to?

6. What is the effect of the Klamath River Basin Compact on this action?

8. Should the court retain jurisdiction if it enters a declaratory judgment?

*Jurisdiction*

Oregon asserts that this court should not declare Indian water rights because the court will be prevented from balancing equities. *Cappaert v. United States*, 426 U.S. 128, 139 (1976). The remedy for the claims of the Indians that their hunting and fishing rights are interfered with is in tort where the competing equities of the parties may be balanced.

Tort remedies are not appropriate here. Hunting and fishing are an integral part of the Indians' traditional way of life. Damages would be difficult to assess and would be inadequate to compensate the Indians for the loss of their hunting and fishing rights. Before a court could grant tort relief, it would have to determine the rights of the Indians under federal law. I believe it is appropriate to declare those rights now.

*The Indians' rights.*

(a) *Hunting and fishing.*

The Indians have hunted, fished, and gathered food on the Reservation lands since time immemorial.

Article I of the Treaty of 1864 secured for the Indians the exclusive right to fish and gather edible plants on the Reservation. That provision includes the right to hunt and trap. *Kimball v. Callahan*, 493 F.2d 564 (9th Cir.), *cert. den.*, 419 U.S. 1019 (1974) (*Kimball I*). This was not a grant of rights to

the Indians, but a reservation of rights already possessed. *United States v. Winans*, 198 U.S. 371 (1905).

Treaty hunting and fishing rights for the Tribe, for all its members on the final tribal roll and for their descendants survived the termination of the Reservation. Klamath Termination Act, 25 U.S. C. § 564-564x; *Kimball v. Callahan*, 590 F.2d 768 (9th Cir. 1979), *petition for cert. filed*, 47 U.S.L.W. 3766 (U.S. May 22, 1979) (No. 78-1538) (*Kimball II*).

(b) *Water Rights.*

The principal purpose of the Treaty was to provide an area for the exclusive occupation of the Indians so that they could continue to be self-sufficient. The Treaty provided two ways for the Indians to be self-sufficient.

First, by ensuring that the Indians could continue their traditional way of life which included hunting, fishing, trapping, and gathering. Article I of the Treaty secured to the Indians their right to pursue their traditional way of life.

Second, by encouraging the Indians to adopt agriculture, Articles II to V provide for Government assistance; nevertheless, most of the Indians chose to retain their traditional way of life.

In my view, the provisions of Article I, particularly the protection of Indian hunting and fishing

rights, were more important to the Tribe in 1964 than were the provisions of Articles II to V.

The Treaty should be construed liberally in favor of the Indians. *Choate v. Trapp*, 224 U.S. 665, 675 (1912); *United States v. Walker River Irrigation District*, 104 F.2d 334 (9th Cir. 1939). Ambiguities and uncertainties in the Treaty should be resolved from the standpoint of the Indians. *Winters v. United States*, *supra*, at 576.

When, by treaty, the Government withdraws land from the public domain and reserves it for a federal purpose, the Government impliedly reserves appurtenant unappropriated water to the extent needed to fulfill the purposes of the reservation. *Cappaert v. United States*, *supra*; *Arizona v. California*, 373 U.S. 546 (1963); *United States v. Powers*, 305 U.S. 527 (1939); *Winters v. United States*, *supra*. Here, the Government reserved land from the public domain and created the Klamath Reservation to preserve Indian hunting and fishing rights and to encourage agriculture.

The Treaty granted the Indians an implied right to as much water on the Reservation as was necessary to fulfill these purposes. The termination of the Reservation did not abrogate the Indians' water rights. Klamath Termination Act, section 14, 25 U.S.C. § 564m. The Indians are still entitled to as much water on the Reservation lands as they need to

protect their hunting and fishing rights. If the preservation of these rights requires that the Marsh be maintained as wetlands and that the forest be maintained on a sustained-yield basis, then the Indians are entitled to whatever water is necessray to achieve those results.[5]

(c) *Individual Indians.*

Individual Indians are entitled to the hunting and fishing rights secured by the Treaty, *Kimball I*, and this implies all of the water rights necessary to protect their hunting and fishing rights.

Some of the individual Indians in this action own land which was allotted or sold to them or to their ancestors. Many of these Indians are farmers; they need water to irrigate their land. In addition to water rights for the preservation of hunting and fishing rights, the Treaty also granted the Indians an implied right to use water necessary for agriculture.

When parts of the Reservation were allotted to individual Indians, they acquired the right to use a portion of the tribal waters essential for cultivation. *United States v. Powers*, *supra*. Indian allottees were not required to appropriate water within any specific period of time, but they could appropriate it as the

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[5]I express no opinion on whether the Indians are entitled to require the Government to preserve their hunting and fishing rights. The Government's current uses of the Marsh and forests of the Reservation are consistent with the Indians' claims in this action; there is no need to decide that question now.

need arose. Their Indian successors in interest acquired the allottees' water rights to the same extent as if the allottees still possessed the land. *United States v. Ahtanum Irrigation District, supra.*

The individual Indian landowners are entitled to use water essential to their agricultural needs when those needs arise. This right, however, is subject to the superior rights of other Indians to use the water for the preservation of hunting and fishing on the Reservation lands.

(d) *The Tribe's rights.*

The Tribe, when it possessed land, possessed hunting and fishing rights and also water rights. Now the Tribe no longer possesses land within the former Reservation.

The defendants contend that water rights are always appurtenant to land; when the Tribe disposed of its land, the Tribe also relinquished all its water rights.

This contention overlooks the nature of the connection between Indian water rights and Indian hunting and fishing rights. The Indians obtained their reserved right to the water they need to cultivate their land from Article II of the Treaty. Their other rights to water come from the hunting and fishing rights reserved to them in Article I. Without sufficient water to preserve fish and

wildlife on the Reservation lands, Indian hunting and fishing rights would be worthless.

The Court of Appeals in *Kimball v. Callahan*, *supra*, held that Indian hunting and fishing rights survived the termination of the Reservation.

Oregon contends that, under *Kimball v. Callahan*, hunting and fishing rights belong to individual Indians only and not to the Tribe. For this contention they rely on one sentence in a note:

> "Treaty rights to hunting and fishing are, however, rights of the individual Indians." 493 F.2d 564, 569 n.9.

This sentence is taken out of context. When considered with the text, it merely means that the individuals retained their hunting and fishing rights even after they withdrew from the Tribe.

The Court did not say that the Tribe had no hunting or fishing rights after the Reservation was terminated. In fact, in *Kimball II*, the Court said that

> "*Kimball I* held that the Act did not abrogate tribal treaty rights of hunting, fishing, and trapping." 590 F.2d 768, 776.

The termination of the Reservation and the dispostion of all Tribal land did not dispossess the Tribe of water rights essential to protect hunting and fishing rights.

(e) *Can the Tribe assert the rights of its members?*

The defendants contend that the Tribe lacks standing to assert hunting and fishing rights on behalf of its members. There is no merit to their contention. The Tribe has the same Treaty hunting and fishing rights and water rights as its members. Even if the Tribe had no hunting and fishing or water rights of its own, it would still have standing to assert those rights on behalf of its members. See *Moe v. Salish and Kootenai Tribes*, 425 U.S. 463 (1976); *Confederated Tribes of Colville v. State of Washington*, 446 F.Supp. 1339 (E.D. Wash. 1978).[6]

*The Government's water rights.*

(a) *Wildlife Refuge and Forest lands within the former Reservation.*

The Government contends that it acquired the Indians' water rights for the land by purchase in 1960[7] and by condemnation in 1973[8]. Congress, in authorizing these acquisitions, intended the Government to acquire Indian rights to a streamflow which would be sufficient to keep the Refuge lands in their natural wetlands state and which would also ensure that the Indians' traditional forest resources could be used on a sustained-yield basis.

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[6]The Tribe does not assert irrigation rights for individual landowners. They are parties to this action and assert their own claims as defendants. It is therefore unnecessary to decide whether the Tribe has standing to assert the irrigation rights of its members.

[7]Act of August 23, 1958.

[8]Act of August 16, 1973.

The Government also contends that it is entitled to the Indians' reserved water rights under the *Winters* doctrine because the Government uses the lands for the same purposes as the Indians used them when the Reservation existed. Defendants disagree. They assert that the *Winters* doctrine applies only to land reserved from the public domain, and does not apply to land acquired by purchase or condemnation.

It is unnecessary to decide these questions. The protection of the Indians' hunting and fishing rights requires a natural streamflow through both the Marsh and forest lands on the former Reservation to fulfill the Government's purposes for those lands.

It is therefore unnecessary to issue a separate declaration of Government water fights for the Refuge and forests of the Reservation.

(b) *Forest lands outside the Reservation.*

The Government withdrew these lands from the public domain for use as a national forest. Under the *Winters* doctrine, the Government acquired reserved rights to use as much unappropriated water as necessary to fulfill the purposes of the national forest.

The defendants do not deny that the *Winters* doctrine applies to this part of the Winema National Forest. Nevertheless, they contend that even under

*Winters* the Government may not appropriate water for fish conservation or recreational purposes. Defendants rely on *United States v. New Mexico*, 438 U.S. 696 (1978). There, the Government in 1899 withdrew land from the public domain for the Gila National Forest. The state court held that the Government was entitled to water essential for the purposes for which the land was withdrawn, but those purposes did not include recreation, aesthetics, wildlife preservation, or cattle grazing. The United States Supreme Court affirmred. It held that, before 1960, Congress intended national forests to be reserved for only two purposes: "to conserve the water flows and to furnish a continuous supply of timber for the people."

In 1960, Congress enacted the Multiple-Use Sustained-Yield Act, 16 U.S.C. § 528 *et seq.*, which extended the purposes for which national forests are reserved. The purposes now include recreation, range, timber, watershed, and wildlife and fish conservation. But the Supreme Court held that the 1960 Act was not retroactive and did not apply to the Gila National Forest.

Here, the Government withdrew land for national forest in 1893, 1906, 1907, and 1930. I agree with the defendants that the 1960 Act does not apply. The Government is only entitled to water which was unappropriated when the forest lands were reserved

and which is essential for timber production and conservation of water flow.

*The rights of non-Indian landowners on former Reservation lands.*

The non-Indian landowner defendants are successors in interest to Indian allottees or Indian purchasers of former Reservation land. They claim rights to water which the Treaty impliedly reserved to the Indians for domestic and agricultural purposes. All of the individual landowner defendants contend that rights under the *Winters* doctrine were appurtenant to Indian allotments and passed to the successors of Indian allottees, whether the successors were Indian or non-Indians. They rely on *United States v. Powers*, *supra*. *United States v. Ahtanum Irrig. Distr.*, *supra*, *United States v. Preston*, 352 F.2d 352 (9th Cir. 1965), and *United States v. Hibner*, 27 F.2d 909 (D.C. Idaho 1938).

*Hibner* was the only case which considered the precise issue involved in this case; namely, what water rights an Indian allottee can convey to his non-Indian successors in interest.

In *Powers*, the Government, for the Crow Indians, sought to prevent non-Indian successors to Indian allottees from appropriating irrigation water. The Supreme Court held that the Crow Reservation treaty contemplated farmed by individual Indians and the treaty impliedly reserved water for the

equal benefit of tribal members. When the Reservation was divided into allotments, the allottees and their successors acquired the right to use a portion of the tribal waters for irrigation. The Court did not consider the extent or nature of the non-Indian defendants' rights to use tribal waters for irrigation.

In *Ahtanum*, the issue was the validity of an agreement which allocated water on the Yakima Reservation between the tribe and non-Indian successors to Indian allottees. The Court held that the non-Indian successors had a right to share in the water the Government diverted to irrigate the Reservation "just as if their lands were still in the possession of the original allottees."

Under *Ahtanum*, the non-Indian successor of an Indian allottee acquires a proportionate share of the water which the Indians diverted for the allottee's land, but the Court did not decide whether the successor also acquires a share of the water reserved to the Indians, but which had not been diverted by the time the allottee conveyed his land to his non-Indian successor.

In *United States v. Preston*, the Court held that an Indian living on a tribal reservation owns a proportionate share of the tribal waters "the minute the reservation is created, and his rights become appurtenant to his land the minute he acquires his allotment." *supra*, at 358.

In *Hibner*, as in this case, the District Court was asked to determine "the priority and amount of water to which the Indian lands . . . and those parties who have succeeded to the Indian allotments" are entitled.

The court held that non-Indian successors to Indian allottees acquire "the same character of water right with equal priority as those of the Indians," expect that: (1) Indian landowners retain their water rights regardless of whether they use them, but non-Indians either use their rights or lose them; and (2) Indians may appropriate their share of reserved tribal water at any time; non-Indians acquire a water right for the actual acreage under irrigation at the time title passed from the Indians, and for any additional acreage which the non-Indian may with reasonable diligence place under irrigation. Non-Indians enjoy the same priority dates as their Indian predecessors for all appropriated water.

*Colville Confederated Tribes v. Walton*, 460 F.Sup. 1320 (E.D. Wash. 1978), involved a similar problem. The court was asked to determine water rights of non-Indian successors to Indian allottees. In a carefully reasoned opinion, Chief Judge Neil reached a different conclusion from *Hibner*. Under the *Winters* doctrine, water is impliedly reserved to ensure that land set aside as a permanent Indian homeland will have the water necessary for the

purposes of the reservation. Judge Neil held that the rationale of the *Winters* doctrine no longer applies after the land passes to non-Indians.

I am impressed with Judge Neil's discussion of the General Allotment Act of 1887, 25 U.S.C. § 331 *et seq.*, which permits sales of allotments to non-Indians[9]. Nevertheless, I prefer *Hibner* for two reasons. First, *Hibner* would advance the General allotment Act's purpose of permitting Indians to sell their land on equal terms with non-Indians. It may be difficult for an Indian to sell his land if the conveyance to a non-Indian carries with it a right to only the amount of water actually appropriated at the time of the conveyance. This is particularly true if the priority date is the actual date of appropriation, and the appropriation was recent.

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[9]Judge Neil held that the General Allotment Act "necessarily implies that some water may be sold with the land; otherwise the right to sell the land would be relatively worthless. The Act was designed to put Indians on an equal footing with the white man by allowing individual Indians to own fee title to land. . . . In providing fee ownership, Congress certainly intended that the Indian could sell his land like any other owner. Providing for alienability of implied reserved water rights is not necessary to accomplish their purpose. The General Allotment Act requires only that the allottee be permitted to convey a water right with his fee to the same extent as a non-Indian homesteader. . . .

"In keeping with the purpose of the General Allotment Act, the allottee, like the non-Indian homesteader, must be permitted to convey with his land the water rights which he was using at the time of the conveyance, with a priority date of the first appropriation of those waters. The priority date must be the date of actual appropriation rather than that of the founding of the reservation, for no part of the Indian allottee's implied water rights may be conveyed to a non-Indian." 460 F.Supp. 1320 at 1328-29.

Second, *Hibner* is more consistent than *Walton* with *Ahtanum* which held that non-Indian successors are entitled to a rateable share of Indian irrigation waters "to the same extent as if their lands were still held by the original allottees." Under *Walton*, a non-Indian successor would have no right to a rateable share, but only to the amount actually used by his allottee-predecessor. Even that amount may be taken from him by an Indian landowner, who would enjoy an earlier priority date for reserved water rights.

I hold that a non-Indian successor to an Indian allottee acquires an appurtentant right to water for the actual acreage under irrigation when he gets title from his Indian predecessor. The priority date of that right is 1864.

The non-Indian also acquires a right, with an 1864 priority date, to water for additional acreage which he, with reasonable diligence, may place under irrigation. Otherwise, if the priortity [*sic*] date of this right and the date of actual appropriation were the same, the additional water might be taken from him at any time by an Indian with reserved water rights.

Once land passes out of Indian ownership, all subsequent conveyances are subject to the doctrine of prior appropriation.

*Rights of the State of Oregon.*

(a) Oregon has authority, under appropriate standards, to regulate for conservation purposes the Indians' hunting and fishing rights on the former Reservation. *Kiball II*, at 778.

(b) Oregon's rights to water for land it acquired by succession to Indian allottees are the same as those of the individual non-Indian landowers in this action.

(c) Oregon claims title to approximately 92,000 acres on the former Reservation. It asserts that the Swamp Lands Act of 1850, 43 U.S.C. § 982 *et seq.*, as extended to Oregon by statute in 1860, 43 U.S.C. § 988, entitled it to claim swamplands within the State. In 1902, Oregon claimed 92,000 acres on the Reservation. The United States Department of the Interior rejected the claim. Oregon contends that the rejection was improper and that patents should have issued to the State.

Oregon also claims "inchoate title" to the land and the right to appropriate essential water, subject to prior appropriation by others. Oregon denies that the Government and the Indians were never entitled to appropriate water for these 92,000 acres.

The Government asserts that, regardless of whether it was right to reject the 1902 claim, Oregon did not pursue the claim, and therefore never acquired valid title to the land. The Govern-

ment also asserts that Oregon's claim of inchoate title has no merit.

The facts on Oregon's claim are insufficiently developed for this court to determine title to the 92,000 acres. If Oregon wants to pursue this claim, it should file a separate action.

*Priority date of the parties' water rights.*

(a) *Indian hunting and fishing rights,*

By the Treaty of 1864, the Indians reserved hunting and fishing rights which they had exercised for more than a thousand years. The priority date of these rights, and of the Indians' water rights which are necessary to preserve their hunting and fishing rights, is time immemorial.

(b) *Indian irrigation rights.*

These rights were granted to the Tribe and its members by the Treaty. The priority date of Indian rights to water for irrigation and domestic purposes is 1864.

(c) *The Government's water rights for the Winema National Forest outside the Reservation.*

The Government withdrew these parcels of land for use as national forest in 1893, 1906, 1907, and 1930. The date on which the Government withdrew each parcel is the priority date of the Government's water rights for that land.

(d) *The rights of the non-Indian landowners and the State of Oregon to water for irrigation and domestic purposes.*

For irrigation and domestic purposes, the non-Indian landowners and the State of Oregon are entitled to an 1864 priority date for water rights appurtenant to their land which formerly belonged to the Indians.

*The Klamath River Basin Compact.*

The individual defendants contend that the Government is not entitled to *Winters*, doctrine rights for the Refuge and National Forest within the Reservation. They assert that when the Government acquired those lands by purchase and condemnation, it acquired only the appurtenant water rights which accompanied conveyance of the land; acquisition of additional water rights after 1957 is governed by the Klamath River Basin Compact, 71 Stat. 497.

I find that it is unnecessary in this action to determine the Government's water rights for the Refuge and National Forest within the Reservation. I therefore hold that there is no need to determine the Compact's relevance to acquistion of water rights by the Government after 1957.

*Retention of jurisdiction.*

In my view it may be necessary for this court to supervise the distribution of water consistent with this opinion and to pass on the many problems which may arise out of the allocation of water. It is therefore appropriate for this court to retain jurisdiction for a period of five years from the date of

judgment or, if appealed, from the date of the final judgment on appeal.

This opinion shall constitute findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52(a).

Counsel for the individual defendants shall submit a proposed form of judgment.

Dated this 27 day of September, 1979.

[Signature omitted in printing]

## APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, Plaintiff-Appellee, | ) | Nos. 80-3229 |
| | ) | 80-3245 |
| | ) | 80-3246 |
| | ) | 80-3257 |
| and | ) | |
| KLAMATH INDIAN TRIBE, Plaintiff-Intervenor-Appellee, | ) | |
| | ) | |
| | ) | |
| vs. | ) | D.C. No. 75-914 |
| | ) | |
| | ) | |
| BEN ADAIR, et. al., Defendants-Appellants, | ) | OPINION |
| | ) | |
| | ) | |
| and | ) | |
| THE STATE OF OREGON, Defendant-Intervenor-Appellant. | ) | |
| | ) | |

Appeal from the United States District Court
for the District of Oregon

Gus J. Solomon, District Judge, Presiding

Argued and Submitted: November 6, 1981

Withdrawn from Submission: July 15, 1983

Resubmitted: November 14, 1983

BEFORE: KILKENNY, GOODWIN, and FLETCHER, Circuit Judges.

FLETCHER, Circuit Judge:

In 1975 the United States filed suit in district court, pursuant to 28 U.S.C. § 1345 (1976), for a declaration of water rights within an area whose boundaries roughly coincide with the former Klamath Indian Reservation. The suit named as defendants some 600 individual owners of land within the former reservation. The Klamath Tribe intervened as a plaintiff and the State of Oregon as a defendant.

After a trial on stipulated facts, supplemented by exhibits and affidavits, the district court issued an opinion declaring: (1) the Tribe and its members have water rights sufficient to maintain their treaty rights to hunt and fish on the former reservation; (2) individual Indian landowners have water rights, subject to the paramount rights of the Tribe, sufficient to maintain agriculture on their lands; and, (3) individual non-Indian landowners could acquire the water rights of their predecessor Indian landowners. The State of Oregon and the individual landowners filed a timely appeal from the district court decision, as did the United States and the Tribe. Our jurisdiction rests on 28 U.S.C. § 1291 (1976). We modify the district court's judgment in part, and as modified, affirm.

# I

# BACKGROUND

*A. History of the Litigation Area.*

This suit concerns water rights in a portion of the Williamson River watershed. The Williamson River is part of the larger Klamath River watershed of Southern Oregon and Northern California. That part of the Williamson River watershed involved in this litigation drains an area of low, forested mountains, flat, grassy valleys and marshes east of the Cascade Range in south-central Oregon. The average rainfall in the area is low; summers are dry and winters are severe.

The major feature of the subject area is a large flat valley historically known as the Klamath Marsh. As the Williamson flows into the north end of this valley, it spreads out and soaks into the porous, pumice soil. During the wet months of the year, open water and aquatic vegetation cover the lower portion of the valley, the water to a depth of a few feet. The remainder of the valley is grassland. During dry summer months, as the water recedes, the grassland in the valley increases. This fluctuating marsh has been an important feeding and resting area for migratory ducks, geese and other waterfowl for thousands of years. In addition, the Marsh has supported a variety of otherindigenous wildlife. More recently, large parts of the Klamath Marsh have been used for grazing cattle.

The Klamath Indians have hunted, fished, and foraged in the area of the Klamath Marsh and upper Williamson River for over a thousand years. In 1864 the Klamath Tribe entered into a treaty with the United States whereby it relinquished its aboriginal claim to some 12 million acres of land in return for a reservation of approximately 800,000 acres in south-central Oregon. This reservation included all of the Klamath Marsh as well as large forested tracts of the Williamson River watershed. Treaty between the United States of America and the Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians, Oct. 14, 1864, 16 Stat. 707. Article I of the treaty gave the Klamath the exclusive right to hunt, fish, and gather on their reservation. *Id.*; *Kimball v. Callahan*, 493 F.2d 564, 566 (9th Cir.), *cert. denied*, 419 U.S. 1019 (1974) (*Kimball I.*) Article II provided funds to help the Klamath adopt an agricultural way of life. 16 Stat. 708.

For 20 years, until 1887, the Klamath lived on their reservation under the terms of the 1864 treaty. In 1887 Congress passed the General Allotment Act, ch. 119, 24 Stat. 388 (1887) (current version at 25 U.S.C. § 331-34, 348, 349, 381 (1976)), which fundamentally changed the nature of land ownership on the Klamath Reservation. Prior to the Act, tribe held the reservation land in communal ownership. Pursuant to the terms of the Allotment Act, howev-

er, parcels of tribal land were granted to individual Indians in fee. Under the allotment system, approximately 25% of the original Klamath Reservation passed from tribal to individual Indian ownership. Over time, many of these individual allotments passed into non-Indian ownership.

The next major change in the pattern of land ownership on the Klamath Reservation occurred in 1954 when Congress approved the Klamath Termination Act. Act of Aug. 13, 1954, c. 732, 1, 68 Stat. 718 (codified at 25 U.S.C. § 564-564w (1976)). Under this Act, tribe members could give up their interest in tribal property for cash. A large majority of the tribe chose to do this. In order to meet the cash obligation, in 1961, the United States purchased much of the former Klamath Reservation. The balance of the reservation was placed in a private trust for the remaining tribe members. *See Kimball I*, 493 F.2d at 567 (describing termination process); *Klamath a nd Modoc Tribes v. United States*, 436 F.2d 1008, 1010-13 (Ct. Cl.) (same), *cert. denied*, 404 U.S. 950 (1971). In 1973, to complete implementation of the Klamath Termination Act, the United States condemned most of the tribal land held in trust. Payments from the condemnation proceeding and sale of the remaining trust land went to Indians still enrolled in the tribe. This final distribution of

assets essentially extinguished the original Klamath Reservation as a source of tribal property.

Even though the Klamath Tribe no longer holds any of its former reservation, the United States still holds title to much of the former reservation lands. In 1958 the Government purchased approximately 15,000 acres of the Klamath Marsh, the heart of the former reservation, to establish a migratory bird refuge under the jurisdiction of the United States Fish and Wildlife Service. Pub. L. No. 85-731, 72 Stat. 816 (1958) (codified as amended at 25 U.S.C. § 564w-1 (1976)). In 1961 and again in 1973, the Government purChased large forested portions of the former Klamath Reservation. This forest land became part of the Winema National Forest under the jurisdiction of the United States Forest Service. 25 U.S.C. § 564w-1(d), 564w-2 (1976). By these two purchases, the Government became the owner of approximately 70% of the former reservation lands. The balance of the reservation is in private, Indian and non-Indian, ownership either through allotment or sale of reservation lands at the time of termination.

*B. Proceedings in the District Court.*

In September of 1975, the United States filed suit in federal district court seeking a declaration of water rights within the Williamson River drainage above the "reef" near Kirk, Oregon.[11] In January of

1976, the State of Oregon initiated formal proceedings under state law to determine water rights in the Klamath Basin including that portion of the Williamson River drainage covered by the Government's suit. *See* Or. Rev. Stat. §§ 539.010-539.110 (1979). Later in 1976, the State of Oregon moved to intervene as a defendant in the United States suit. The Klamath Tribe also moved to intervene in the federal suit as a plaintiff. Both motions were granted. Subsequently, the State, joined by the individual defendants, moved for dismissal of the federal court water rights adjudication in favor of the state proceeding under the rule announced by the Supreme Court in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). The district court in effect denied the defendants' motion to dismiss when on November 14, 1977, it entered a Pretrial Order to govern the conduct of the federal suit.

This order, in listing the issues to be decided, significantly limited the nature of the federal proceeding. The district court did not agree to decide any question concerning the actual quantification of water rights. The questions listed fell within three basic categories: (1) whether water rights had been reserved for the use of Klamath reservation lands in the 1864 treaty; (2) whether such rights passed to the Government and to private persons who subse-

quently took fee title to reservation lands; and (3) what priorities should be accorded the water rights of each of the present owners and users of former reservation lands. Although the district court agreed to specify the proper method for measuring the reserved water rights originally attaches to the, reservation, it declined to quantify that measure. Rather, it declared that "[a]ctual quantification of the rights to the use of waters of the Williamson River and its tributaries within the litigation area will be left for judicial determination, consistent with the decree in this action, by the State of Oregon under the provisions of 43 U.S.C. § 666 [the McCarran Amendment]."

Pursuant to the terms of the Pretrial Order, the district court determined the priority of water rights among the litigants as follows: (1) the Klamath Tribe Indians have a water right, with a priority date of time immemorial, "to as much water on the Reservation lands as they need to protect their hunting and fishing rights," *United States v. Adair*, 478 F. Supp. 336, 345 (D.Or. 1979); (2) this Indian water right is coterminous with the water right claimed by the United States as a successor land owner, and therefore renders it unnecessary to determine whether the right has been transferred to the United States, *id.* at 347; (3) those lands now owned by the United States outside the former

reservation carry a water right with priority from the date of withdrawal from the public domain, sufficient to meet the forest purpose of the withdrawal, *id.* at 348; (4) individual Indians who still own former reservation lands have water rights, with priority dating from the 1864 treaty, "to use water essential to their agricultural needs . . . subject to the superior right of other Indians to use the water for the preservation of hunting and fishing . . . ," *id.* at 346; and, (5) individual non-Indians who own former reservation lands have a water right "to water for the actual acreage under irrigation when [they received] title from [their] Indian predecessor[s]. The priority date of that right is 1864. [These individual non-Indians also acquired] a right, with an 1864 priority date, to water for additional acreage which . . . with reasonable diligence, may [be] place[d] under irrigation." *Id.* at 349.

The State of Oregon and the individual defendants appeal from the district court's decision. They argue, first, that the district court should have dismissed the federal suit, and second, that the district court erroneously awarded water rights to the Tribe and the United States as the Tribe's successor. The United States and the Tribe also appeal; they argue that the district court erroneously awarded water rights to non-Indian successors of

Indian landowners. We first consider whether the district court should have dismissed this suit under the *Colorado River* doctrine.

II

COLORADO RIVER *ABSTENTION*

*A. Background: The* Colorado River *Doctrine.*

In *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), the Supreme Court upheld a district court's dismissal of an action for federal adjudication of water rights in favor of a contemporaneous state adjudication. In *Arizona v. San Carlos Apache Tribe of Arizona*, the Court, following *Colorado River*, made clear its view that in most cases a federal court should defer to a contemporaneous and comprehensive state water rights adjudication because "water rights adjudication is a virtually unique type of proceeding, and the McCarran Amendment is a virtually unique federal statute." Slip op. at 24. *See Arizona v. San Carlos Apache Tribe of Arizona*, No. 81-2147, slip op. at 24 (U.S. July 1, 1983). The course of our review and analysis in this case is necessarily determined by the factors found controlling in those two cases.

*1. Federal Jurisdiction over Indian Water Rights.* Plainly, the district court had jurisdiction. Federal courts have jurisdiction under 28 U.S.C. § 1345 (1976) to adjudicate the water rights claims of the United States. *Cappaert v. United States*, 426 U.S.

128, 145-46(1976). While the Court in *Colorado River* pointed out that "state court[s] [have] jurisdiction over Indian water rights under the [McCarran] Amendment," 424 U.S. at 809, this statement does not imply that state courts have *exclusive* jurisdiction over such rights. In fact, the *Colorado River* Court made this point explicit when it held that "the McCarran Amendment in no way diminished federal-district-court jurisdiction under § 1345 and . . . the District Court had jurisdiction to hear this case." *Id.* In *San Carlos Apache Tribe*, the Supreme Court reaffirmed that the McCarran Amendment did not do away with federal jurisdiction over water rights claims brought under section 1345 or section 1362. *See* slip op. at 12 & n.10.[12]

The *Colorado River* doctrine is an exception to the general rule that where a district court has statutory jurisdiction, it has a "virtually unflagging obligation" to exercise that jurisdiction. *Colorado River*, 424 U.S. at 817; *see England v. Board of Medical Examiners*, 375 U.S. 411, 415 (1964).[13] We read *Colorado River and San Carlos Apache Tribe* to counsel abstention in the interest of "wise judicial administration," despite that obligation, in the majority of water rights adjudications.[14]

The Court, however, has emphasized that its decision in *Colorado River* was not intended to preclude all adjudication in federal court of water

rights arising under federal law. *See San Carlos Apache Tribe*, slip op. at 22. The Court recognized in *Colorado River* that the circumstances justifying dismissal of a federal suit for reasons of wise judicial administration "are considerably more limited than the circumstances appropriate for abstention." 424 U.S. at 818.[15] The Court concluded: "No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required." *Id.* at 818-19; *accord Moses H. Cone Memorial Hospital v. Mercury Construction*, 103 S.Ct. at 937. In *San Carlos Apache Tribe*, the Court's analysis emphasized the importance, in making this judgment, of avoiding "the possibility of duplicative litigation, t.ension and controversy between federal and state forums, hurried and pressured decisionmaking, and confusion over the disposition of property rights." Slip op. at 22. With these policies in mind, we turn to a review of the district court's "carefully considered judgment" in light of the facts presented to the court.

*B. Standard of Review*

Our review is limited to a determination of whether the district court abused its discretion in proceeding to decide rather than dismiss this case.[16] In *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655,

664 (1978), the Supreme Court stated that the decision to dismiss for reasons of wise judicial administration is one "largely committed to the discretion of the district court." *See also Moses H. Cone Memorial Hospital v. Mercury Construction*, 103 S.Ct. at 938; *Cf. Brillhart v. Excess Insurance Co. of America*, 316 U.S. 491, 495 (1942) (decision whether to abstain from exercising federal jurisdiction in light of pending state proceeding is committed to district court's discretion). In the present case, therefore, we will not set aside the district court's decision to exercise its jurisdiction unless we have a definite and firm conviction that the district court committed a clear error of judgment in concluding that exceptional circumstances requiring dismissal were not presented.[17] *Anderson v. Air West, Inc.*, 542 F.2d 522, 524 (9th Cir. 1976). *Accord, Davis v. Fendler*, 650 F.2d 1154, 1161 (9th Cir. 1981); *United States v. Sumitomo Marine & Fire Insurance Co.*, 617 F.2d 1365, 1369 (9th Cir. 1980). We conclude that the district court did not abuse its discretion by choosing to determine the federal law priorities among water rights in this suit.

*C. Analysis of the District Court Decision*

The state of Oregon and the individual defendants argue that the district court's exercise of jurisdiction fragments the adjudication of water rights in the Williamson River, contrary to the

policy of the McCarran Amendment. The United States and the Tribe argue that the district court decision addresses a discrete water rights issue in a context that does not fragment the state general stream adjudication. They argue further that the district court judgment easily can be integrated into the state proceeding with no loss of efficiency.

Because of the posture in which this case has reached us, and because the chief goal of abstention under the *Colorado River* doctrine is the conservation of state and federal judicial resources, *see San Carlos Apache Tribe*, slip op. at 22, we hold that, on the facts of this case, the district court did not abuse its discretion by proceeding to decide, rather than dismiss, the federal law questions presented to it by the United States' suit. Indeed, were we to rule otherwise, and erase the district court's careful and time-consuming consideration of the federal water rights questions presented by this suit, thereby necessitating relitigation of the same issues in state court, we would, in effect, "throw the baby out with the bath" and create precisely the duplication and waste of judicial effort that *Colorado River* abstention and the McCarran Amendment are designed to avoid.

The Supreme Court stated in *San Carlos Apache Tribe* that:

> *Colorado River, of course, does not require that a federal water suit must always be dismissed* or stayed in deference to a concurrent and adequate comprehensive state adjudication. Certainly, the federal courts need not defer to the state proceedings if the state courts expressly agree to stay their own consideration of the issues raised in the federal action pending disposition of that action. Moreover, it may be in a particular case that, at the time a motion to dismiss is filed, the federal suit at issue is well enough along that its dismissal would itself constitute a waste of judicial resources and an invitation to duplicative effort. *See Colorado River*, 424 U.S. at 820; *Moses H. Cone Hospital*, 460 U.S. at ___ . Finally, we do not deny that, in a case in which the arguments for and against deference to a state adjudication were otherwise closely matched, the fact that a federal suit was brought by Indians on their own behalf and sought only to adjudicate Indian rights should be figured into the balance.

Slip op. at 22 (emphasis added). In its present posture, this case, in our view, presents the kind of circumstances recognized by the Supreme Court as features of a particular suit that tip the balance against dismissal of a federal adjudication of Indian water rights even in the face of a contemporaneous but nascent state proceeding.

*1. "Stay" of State Proceedings.*

At the time the United States filed this action in the district court in September of 1975 there was no contemporaneous state proceeding of any kind to adjudicate water rights in the upper Williamson River watershed. Some months after the United

States filed its suit in federal court, however, the Oregon State Water Resources Director issued a notice announcing that on Sept. 1, 1976, he would "begin an investigation of the flow and use of waters of the Klamath River and its tributaries . . . ." Under the Oregon scheme for adjudicating water rights, such a notice of investigation is one of the prerequisites to a state court determination of water rights. In addition, the Water Resources Director, after investigation, must decide that the "facts and conditions justify" making a determination of water rights. *See* Or. Rev. Stat. 539.020 (1981). At the time the district court rules on defendants' motion to dismiss the federal suit, none of the preliminary steps in the Oregon adjudication had been completed.[18]

Of equal or greater importance to our decision in this case, however, is the fact that even at this time, some seven years after the Oregon Water Resources Director issued his notice of investigation, the state determination of water rights in the Klamath Basin has not proceeded beyond administrative investigation. Indeed, the information-gathering stage of the procedure is not yet complete. In effect, the state proceeding has been stayed during the pendency of this federal suit. *See San Carlos Apache Tribe of Arizona*, slip op. at 22.[19]

*2. Duplication and and Waste of Judicial Resources That Would be Occasioned by Dismissal of the Federal Suit.*

As the Supreme Court in *San Carlos Apache Tribe* warned, "in a particular case . . . the federal suit at issue [may be] well enough along that its dismissal would itself constitute a waste of judicial resources and an invitation to duplicative effort." Slip op. at 22.[20] It is our opinion that this case presents precisely such a situation. First, we note that the district court carefully tailored its exercise of jurisdiction to decide only the priority among water rights created under federal law. *See infra* Section II(C)(1)(c); *See also Moses H. Cone Memorial Hospital v. Mercury Construction*, 103 S.Ct. at 941. Second, the contemporaneous state proceeding for adjudicating water rights was, and still is, nascent. Finally, the district court has taken evidence, heard extensive argument from all of the parties, and developed a multi-volumed record on which to base its decision of the water rights questions presented by this case. Both the individual defendants as well as the intervenor, State of Oregon, have been offered, and have taken, a full opportunity to participate in all aspects of this litigation. The district court's determination of water rights is more than "well enough along," it is complete. Given this factual setting, it is clear to us that neither the policies of the McCarran Amendment, nor the

interest of wise judicial administration would be served by a decision from this court reversing and vacating the district court's judgment without reaching the merits. *See San Carlos Apache Tribe*, slip op. at 22.

*3. The District Court's Adjudication of Indian Water Rights*

In its Pretrial Order, the district court carefully outlined the issues it would decide and those it would leave to subsequent state adjudication. The court limited its determination to ordering the priority among reserved water rights arising under federal law. The district court explicitly anticipated that "[a]ctual quantification of the [reserved] rights to use of the waters of the Williamson River and its tributaries within the [federal] litigation area will be left for judicial determination, consistent with the decree in this action, by the State of Oregon under the provisions of [the McCarran Amendment]."

In so limiting its exercise of jurisdiction, the district court avoided passing on questions of state water law and indeed ruled only on those questions involving application of the federal Indian law doctrine of reserved water rights. Far from improperly intruding on the role of the state court, we find that in exercising federal jurisdiction in this fashion the district court coordinated its adjudication of water rights with adjudication by the state court so

as to allow each forum to consider those issues most appropriate to its expertise.[21]

In addition, while this case was not filed initially by the Klamath Tribe under the provisions of 28 U.S.C. § 1362, the Tribe intervened on its own behalf shortly after the United States filed suit. Such intervention was quite proper since, had the Tribe not intervened, the United States could have been in the difficult position of representing competing interests in the same law suit. *See infra* Section III(C); *see also Nevada v. United States*, 103 S.Ct. 2906, 2917 (1983) (recognizing problems faced by Goverment when it is given the duty to represent competing interests). Once the Tribe intervened, in light of the district court's limited exercise of jurisdiction, the case presented, for all practical purposes, a suit to adjudicate Indian water rights on behalf of an Indian Tribe. See *San Carlos Apache Tribe*, slip op. at 22.

*4. Summary.*

The district court limited its exercise of jurisdiction to a determination of the priority among federal water rights on lands roughly within the boundaries of the former Klamath Indian Reservation. It did not undertake a general stream adjudication. Proceeding in this fashion, it avoided the duplication of any state water rights adjudication and, we think, the pitfalls of piecemeal determination of water

rights. In fact, the district court considered those factors identified as "secondary" in *Colorado River*, *see* 424 U.S. at 820, and found, correctly we think, that they did not counsel dismissal.[22] Under these circumstances we cannot say that the district court abused its discretion. Because the district court had statutory jurisdiction to act as it did, and because we believe it would be an exercise in unwise and wasteful judicial administration inconsistent with the Supreme Court's decision in *San Carlos Apache Tribe* to vacate and cast aside the district court's carefully considered judgment in these matters, we proceed to a review of the merits of the district court's decision.

## III

## WATER RIGHTS

The district court declared reserved water rights within the litigation area to the Klamath Tribe, the Government, individual Indians, and non-Indian successors to Indian land owners. Each of the parties appeals from a different aspect of the district court's judgment. We address, first, the State and individual defendants' appeal from the court's declaration of water rights to the Tribe.

### *A. A Reservation of Water to Accompany the Tribe's Treaty Right to Hunt, Fish, and Gather.*

Article I of the 1864 treaty with the Klamath Tribe reserved to the Tribe the exclusive right to

hunt, fish, and gather on its reservation. 16 Stat. 707, 708; *Kimball I*, 493 F.2d at 566. This right survived the Klamath Termination Act, 25 U.S.C. §§ 564-564w (1976). *See Kimball v. Callahan*, 590 F.2d 768, 775 (9th Cir.), *cert. denied*, 444 U.S. 826 (1979) (*Kimball II*); *Kimball I*, 493 F.2d at 569. The issue presented for decision in this case is whether, as the district court held, these hunting and fishing rights carry with them an implied reservation of water rights.

*1. Reservation of Water in the 1864 Treaty.*

In *Winters v. United States*, 207 U.S. 564, 576-77 (1908), the Supreme Court held that the treaty creating the Fort Belknap Indian Reservation contained an implied reservation of water to irrigate the arid Indian lands. More recently, in *Cappaert v. United States*, 426 U.S. 128 (1976), and *United States v. New Mexico*, 438 U.S. 696 (1978), the Supreme Court addressed the scope and nature of *Winters* doctrine water rights on federal lands other than Indian reservations. In *Cappaert*, the Court upheld a lower court determination that, in setting aside the Devil's Hole National Monument, the United States had reserved a quantity of water sufficient to meet the purposes for which the Monument was established. The Court stated:

> In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the

> Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created.

426 U.S. at 139. In *New Mexico*, the Supreme Court clarified the scope of the reserved water rights doctrine in the course of determining whether the United States had reserved water for use on the Gila National Forest in New Mexico. The Court indicated that water may be reserved under the *Winters* doctrine only for the primary purposes of a federal reservation. 438 U.S. at 702. Hence, even though the Supreme Court agreed that hunting, fishing, and recreation are among the purposes for which the National Forest System is maintained, it determined that these purposes are secondary to the purposes of "securing favorable conditions of water flows," and furnishing "a continuous supply of timber." 16 U.S.C. § 475 (1976), *quoted in United States v. New Mexico*, 438 U.S. at 706-07. Accordingly, only the latter purposes carried with them an implied reservation of water rights. 438 U.S. at 713-15. *New Mexico* and *Cappaert*, while not directly applicable to *Winters* doctrine rights on Indian reservations, *see* F. Cohen, *Handbook of Federal Indian Law* 581-85 (1982 ed.),[23] establish several useful guidelines. First, water rights may be implied only "[w]here water is necessary to fulfill the very purposes for

which a federal reservation was created," and not where it is merely "valuable for a secondary use of the reservation." *New Mexico*, 438 U.S. at 702. Second, the scope of the implied right is circumscribed by the necessity that calls for its creation. The doctrine "reserves only that amount of water necessary to fulfill the purpose of the reservation, no more." *Cappaert*, 426 U.S. at 141.

The question, therefore, is whether securing to the Indians the right to hunt, fish, and gather was a primary purpose of the Klamath Reservation. Resolution of this question, in turn, depends on an analysis of the intent of the parties to the 1864 Klamath Treaty as reflected in its text and the surrounding circumstances. *See Washington v. Fishing Vessel Ass'n*, 443 U.S. 658, 675-76 (1979); *United States v. Winters*, 207 U.S. at 575-76. The State and individual appellants argue that the intent of the 1864 Treaty was to convert the Indians to an agricultural way of life. The Government and the Tribe argue that an equally important purpose of the treaty was to guarantee continuity of the Indians' hunting and gathering lifestyle. Under the guidelines established in *Cappaert* and New Mexico, we find that both objectives qualify as primary purposes of the 1864 Treaty and accompanying reservation of land.

Article I of the Klamath Treaty expressly provides that the Tribe will have exclusive on-reservation fishing and gathering rights. 16 Stat. 708. This language has been interpreted to include, in addition, a grant of exclusive hunting and trapping rights. *Kimball I*, 493 F.2d at 566; *Klamath & Modoc Tribes v. Maison*, 139 F. Supp. 634, 637 (D. Or. 1956), *aff'd in part, rev'd in part*, 338 F.2d 620 (9th Cir. 1964). As this court noted in *Kimball I*,

> The specific treaty provision reserving the Klamaths' exclusive right to fish could prompt the argument that their treaty excludes the right to hunt. However, in light of the highly significant role that hunting and trapping played (and continue to play) in the lives of the Klamaths, it seems unlikely that they would have knowingly relinquished these rights at the time they entered into the treaty.

493 F.2d at 566 (foothote omitted).[24] In view of the historical importance of hunting and fishing, and the language of Article I of the 1864 Treaty, we find that one of the "very purposes" of establishing the Klamath Reservation was to secure to the Tribe a continuation of its traditional hunting and fishing lifestyle. This was at the forefront of the Tribe's concerns in negotiating the treaty and was recognized as important by the United States as well.[25]

At the same time, as the State and individual defendants argue, Articles II through V of the 1864 Treaty evince a purpose to convert the Klamath

Tribe to an agricultural way of life. Article II provides that monies paid to the Tribe in consideration for the land ceded by the treaty "shall be expended . . . to promote the well-being of the Indians, advance them in civilization, *and especially agriculture*, and to secure their moral improvement and education." 16 Stat. 708 (emphasis added). A similar focus on agriculture is reflected in the language of Articles III, IV and V. *Id.* at 708-09. It is apparent that a second essential purpose in setting aside the Klamath Reservation, recognized by both the Tribe and the Government, was to encourage the Indians to take up farming.

Neither *Cacpaert* nor *New Mexico* requires us to choose between these activities or to identify a single essential purpose which the parties to the 1864 Treaty intended the Klamath Reservation to serve. *See supra* note 11. In fact, in *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981), this court found that provision of a "homeland for the Indians to maintain their agrarian society," *id.* at 47, as well as "preservation of the tribe's access to fishing grounds," *id.* at 48, were dual purposes behind establishment of the Colville Reservation. Consequently the court found an implied reservation of water to support both of these activities. President Grant established the Colville Reservation in a

one-paragraph Executive Order that stated only that the land would be "set apart as a reservation for said Indians.[26] Thus the court in *Colville* discovered the purposes of the reservation and implied water rights from a much less explicit text than that provided by the 1864 Klamath Treaty, Articles I through V. *See Colville*, 647 F.2d at 47 n.8. We therefore have no difficulty in upholding the district court's finding that at the time the Klamath Reservation was established, the Government and the Tribe intended to reserve a quantity of the water flowing through the reservation not only for the purpose of supporting Klamath agriculture, but also for the purpose of maintaining the Tribe's treaty right to hunt and fish on reservation lands.

A water right to support game and fish adequate to the needs of Indian hunters and fishers is not a right recognized as a part of the common law doctrine of prior appropriation followed in Oregon.[27] Indeed, one of the standard requirements of the prior appropriation doctrine is that some diversion of the natural flow of a stream is necessary to effect a valid appropriation.[28] But diversion of water is not required to support the fish and game that the Klamath Tribe take in exercise of their treaty rights. Thus the right to water reserved to further the Tribe's hunting and fishing purposes is unusual in that it is basically non-consumptive. *See* 1 R.

Clark, *Waters and Water Law* § 55.2, at 578-81 (1967). The holder of such a right is not entitled to withdraw water from the stream for agricultural, industrial, or other consumptive uses (absent independent consumptive rights). Rather, the entitlement consists of the right to prevent other appropriators from depleting the streams waters below a protected level in any area where the non-consumptive right applies. *See Cappaert*, 426 U.S. at 143 (characterizing right in similar manner). In this respect, the water right reserved for the Tribe to hunt and fish has no corollary in the common law of prior appropriations.[29]

*2. Effect of the Klamath Termination Act on the Tribe's Hunting and Fishing Water Rights.*

In 1954, Congress terminated federal supervision of the Klamath Tribe. 25 U.S.C. §§ 564-564w (1976). The state and individual appellants now argue that the Termination Act also abrogated any water rights reserved by the 1864 Treaty to accompany the Tribe's right to hunt and fish. Appellants contend that when federal supervision was terminated, former reservation lands were sold at full market value without limitations on use. *See* Act of Aug. 23, 1958, Pub. L. No. 85-371, 72 Stat. 816, 817 (1958 amendments to Termination Act). They conclude that recognition of a reserved water right to sustain the Tribe's hunting and fishing rights would impose servitude or limitation on the use of former reserva-

tion lands in contravention of the Termination Act policy of unencumbered sale.

Appellants' argument, however, overlooks the substantive language of the Termination Act,[30] the canons of construction for legislation affecting Indian Tribes, and the implications of our decision in *Kimball I.* Section 564m(a) of the Termination Act provides, "[n]othing in sections 564-564w of this title shall abrogate any water rights of the tribe and its members." 25 U.S.C. § 564(m)(a) (1976); *see Menominee Tribe v. United States*, 391 U.S. 404, 416 n.7 (1968) (Stewart, J., dissenting). This provision admits no exception, nor can it be read to exclude reserved water rights. Congress presumably was aware of the importance of such rights to Indian tribes at the time it drafted section 564m of the Klamath Termination Act.[31] A conclusion that the Termination Act ended the Klamath's hunting and fishing water rights would impute to Congress the intention to abrogate rights guaranteed to the Tribe in the 1864 Treaty. As the Supreme Court noted in *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968), it is "difficult to believe that Congress, without explicit statement, would subject the United States to a claim for compensation by destroying property rights conferred by treaty." *See Swim v. Bergland*, 696 F.2d 712, 717 (9th Cir. 1983); *United States v. State of Washington*, 520 F.2d 676, 693 (9th

Cir. 1975) ("[o]nce a tribe is determined to be a party to a treaty, its rights under that treaty may be lost only by unequivocal action of Congress."), *cert. denied*, 423 U.S. 1086 (1976); Comment, *The Water Rights of Klamath Indian Allottees*, 59 Ore. L. Rev. 299, 312-17 (1980). Because Congress in section 564m of the Termination Act explicitly protected tribal water rights and nowhere in the Act explicitly denied them, we can only conclude that such rights survived termination. Our conclusion is Confirmed by this court's prior decision in *Kimball I*. There we found that the Tribe's hunting and fishing rights, protected by Article I of the 1864 Treaty, survived passage of the Termination Act. 493 F.2d at 568-69; *see Kimball II*, 590 F.2d at 775. Were we to deny today reservation of sufficient water to protect the rights recognized in *Kimball I* and *II*, we would effectively nullify the substance of those decisions. In sum, we agree with the district court that the water rights reserved to the Klamath Tribe by Treaty in 1864 were not abrogated by enactment of the Klamath Termination Act in 1954.

*3. Priority of the Water Right Reserved to Accompany the Tribe's Treaty Right to Hunt and Fish.*

The district court found that the Tribe's water right accompanying its right to hunt and fish carried a priority date for appropriation of time immemorial. *United States v. Adair*, 478 F. Supp. at 350. The State and individual appellants argue that an

implied reservation of water cannot have a priority date earlier than establishment of the reservation. The Government and the Tribe argue that a pre-reservation priority date is appropriate for tribal water uses that pre-date establishment of the reservation. We have been unable to find any decisions that squarely address this issue. We therefore begin our analysis by turning to well-established principles of Indian treaty interpretation and Indian property rights for guidance.

Foremost among these is the principle that "the treaty is not a grant of rights to the Indians, but a grant of rights from them — a reservation of those not granted." *United States v. Winans*, 198 U.S. 371, 381 (1905); *accord Washington v. Fishing Vessel Ass'n*, 443 U.S. 658, 678, 680-81 (1979); *United States v. Wheeler*, 435 U.S. 313, 327 n.24 (1978). Further, Indian treaties should be construed as the tribes would have understood them. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *United States v. Top Sky*, 547 F.2d 486, 487 (9th Cir. 1976); *Kimball I*, 493 F.2d at 566 & n.7 (treaty construed as Indians would have understood it given practices and customs of tribe at time treaty was negotiated); *see also Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 551-54 (1832). And any ambiguity in a treaty must be resolved in favor of the Indians. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 n.17

(1978); *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976); *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951, 962 (9th Cir.), *cert. denied*, ___ U.S. ___ , 103 S.Ct. 314 (1982). A corollary of these principles, also recognized by the Supreme Court, is that when a tribe and the Government negotiate a treaty, the tribe retains all rights not expressly ceded to the Government in the treaty so long as the rights retained are consistent with the tribe's sovereign dependent status. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. at 208; *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321, 326 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957).

In 1864, at the time the Klamath entered into a treaty with the United States, the Tribe had lived in Central Oregon and Northern Califonia for more than a thousand years. This ancestral homeland encompassed some 12 million acres. Within its domain, the Tribe used the waters that flowed over its land for domestic purposes and to support its hunting, fishing, and gathering lifestyle. This uninterrupted use and occupation of land and water created in the Tribe aboriginal or "Indian title" to all of its vast holdings. *See United States v. Klamath and Moadoc Tribes*, 304 U.S. 119, 122-23 (1938); *see also United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 345 (1941); *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 244 (1872). *See generally*, Note,

"*Indian Title: The Rights of American Natives in Lands They Have Occupied Since Time Immemorial*," 75 Colum. L. Rev. 655 (1975). Aboriginal title is "considered as sacred as the fee simple of the whites." *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 745 (1835); *accord United States v. Santa Fe Pacific R. Co.*, 314 U.S. at 345. The Supreme Court has specifically held that the Tribe had aboriginal title to timber on the Klamath Reservation. *United States v. Klamath and Moadoc Tribes*, 304 U.S. 119, 122-23 (1938). The Tribe's title also included aboriginal hunting and fishing rights, *see Sac & Fox Tribe of Mississippi in Iowa v. Licklider*, 576 F.2d 145, 151 (8th Cir.), *cert. denied*, 439 U.S. 955 (1978), and by the same reasoning, an aboriginal right to the water used by the Tribe as it flowed through its homeland. *Cf. United States v. Santa Fe Pacific R. Co.*, 314 U.S. at 344, 359 (accounting ordered for rents, issues and profits derived from lands to which tribe held aboriginal title). Only the United States can extinguish such aboriginal title. *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 46 (1946). Until the latter part of the nineteenth century, aboriginal title was most often extinguished by a treaty between the affected tribe and the United States. *See* C. Wilkinson & J. Volkman, *Judicial " Review of Indian Treaty Abrogation: As Long as Water Flows, or Grass Grows Upon the*

*Earth — How Long a Time Is That?*" 63 Calif. L. Rev. 601, 608-12 (1975).

With this background in mind, we examine the priority date attaching to the Klamath Tribe's reservation of water to support its hunting and fishing rights. In Article I of the 1864 Treaty the Tribe expressly ceded "all [its] right, title and claim" to most of its ancestral domain. 16 Stat. 707. In the same article, however, the Tribe reserved for its exclusive use and occupancy the lands that became the Klamath Reservation, the same lands that are the subject of the instant suit. 16 Stat. 708. There is no indication in the treaty, express or implied, that the Tribe intended to cede any of its interest in those lands it reserved for itself. *See United States v. Winans*, 198 U.S. at 381; *United States v. Ahtanum Irrigation Dist.*, 236 F.2d at 326. *See also Bryan v. Itasca County*, 426 U.S. at 392. Nor is it possible that the Tribe would have understood such a reservation of land to include a relinquishment of its right to use the water as it had always used it on the land it had reserved as a permanent home. *See Choctaw Nation v. Oklahoma*, 397 U.S. at 631; *Kimball I*, 493 F.2d at 566. Further, we find no language in the treaty to indicate that the United States intended or understood the agreement to diminish the Tribe's rights in that part of its aboriginal holding reserved for its permanent

occupancy and use. Accordingly, we agree with the district court that within the 1864 Treaty is a recognition of the Tribe's aboriginal water rights and a confirmation to the Tribe of a continued water right to support its hunting and fishing lifestyle on the Klamath Reservation.

Such water rights necessarily carry a priority date of time immemorial. The rights were not created by the 1864 Treaty, rather, the treaty confirmed the continued existence of these rights. *See Washington v. Fishing Vessel Ass'n*, 443 U.S. at 678-81; *State v. Coffee*, 97 Idaho 905, ___ , 556 P.2d 1185, 1188 (1976); *see also Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Johnson v. McIntosh*, 21 U.S. (8. Wheat.) 543 (1823). *See generally* W. Veeder, *Indian Prior and Paramount Rights to the Use of Water*, 16 Rocky Mth. Min. L. Inst. 631, 649-57 (1971). To assign the Tribe's hunting and fishing water rights the later, 1864, priority date argued for by the State and individual appellants would ignore one of the fundamental principles of prior appropriations law — that priority for a particular water right dates from the time of first use. *See* 5 R. Clark, *Waters and Water Rights* 410, 414.2 (1972). Furthermore, an 1864 priority date might limit the scope of the Tribe's hunting and fishing water rights by reduction for any pre-1864 appropriations of water. This could extinguish rights the Tribe held

before 1864 and intended to reserve to itself thereafter. Thus, we are compelled to conclude that where, as here, a tribe shows its aboriginal use of water to support a hunting and fishing lifestyle, and then enters into a treaty with the United States that reserves this aboriginal water use, the water right thereby established retains a priority date of first or immemorial use.[32]

This does not mean, however, as the individual appellants argue, that the former Klamath Reservation will be subject to a "wilderness servitude" in favor of the Tribe. Apparently, appellants read the water rights decreed to the Tribe to require restoration of an 1864 level of water flow on former reservation lands now used by the Tribe to maintain traditional hunting and fishing lifestyles. We do not interpret the district court's decision so expansively. In its opinion discussing the Tribe's hunting and fishing water rights, the district court stated "[t]he Indians are still entitled to as much water on the Reservation lands as they need to protect their hunting and fishing rights." 478 F. Supp. at 345. We interpret this statement to confirm to the Tribe the amount of water necessary to support its hunting and fishing rights as currently exercised to maintain the livelihood of Tribe members, not as these rights once were exercised by the Tribe in 1864. We find authority for such a construction of

the Indians' rights in the Supreme Court's decision in *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658 (1979). There, citing *Arizona v. California*, 373 U.S. 546 (1963), a reserved water rights case, the court stated "that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but not more than, is necessary to provide the Indians with a livelinood — that is to say, a moderate living." 443 U.S. at 686. Implicit in this "moderate living" standard is the conclusion that Indian tribes are not generally entitled to the same level of exclusive use and exploitation of a natural resource that they enjoyed at the time they entered into the treaty reserving their interest in the resource, unless, of course, no lesser level will supply them with a moderate living. *See Washington v. Fishing Vessel Ass'n*, at 686.[33] As limited by the "moderate living" standard enunciated in *Fishing Vessel*, we affirm the district court's decision that the Klamath Tribe is entitled to a reservation of water, with a priority date of immemorial use, sufficient to support exercise of treaty hunting and fishing rights.[34]

*B. Water Rights of Successors-in-Interest to Klamath Indian Allottees.*

The district court declared water rights to both Indian and non-Indian successors-in-interest to Klamath Indian allottees. As to the Indian owners of allotted lands, appellants argue that the terms of

the Klamath Termination Act subject any water rights of such allottees to state water law. *See* 25 U.S.C. § 564m (1976). The Tribe, by cross-appeal, also challenges the district court's declaration of water rights to non-Indian successors-in-interest to lands previously allotted to members of the Tribe. We affirm the district court's determination in all respects on these issues.

*1. Indian Successors to Allotted Reservation Lands.*

With regard to individual Indian landowners, the district court stated:

> The individual Indian landowners are entitled to use water essential to their agricultural needs when those needs arise. This right, however, is subject to the superior right of other Indians to use the water for the preservation of hunting and fishing on Reservation lands.
>
> . . .
>
> The priority date of Indian rights to water for irrigation and domestic purposes is 1864.

478 F. Supp. at 346, 350. The scope of Indian irrigation rights is well settled. *See Arizona v. California*, 373 U.S. 546, 599-601 (1963). It is a right to sufficient water to "irrigate all the practicably irrigable acreage on the reservation." *Id.* at 600. Individual Indian allottees have a right to use a portion of this reserved water. *United States v. Powers*, 305 U.S. 527, 531 (1939). Moreover, the full measure of this right need not be exercised immedi-

ately. As with rights reserved to the Tribe, water may be used by Indian allottees for present and future irrigation needs.[35] *See Colville Confederated Tribe v. Walton*, 647 F.2d at 51; *United States v. Ahtanum Irrigation District*, 236 F.2d 321, 342 (9th Cir. 1956).

This right is limited here only by section 564m of the Klamath Termination Act, 25 U.S.C. § 564(m) (1976). This section provides, first, that "[n]othing in [The Termination Act] shall abrogate any water rights of the tribe and its members," and second, that "the laws of the State of Oregon with respect to abandonment of water rights by non-use shall not apply to the tribe and its members until fifteen years after the date of the proclamation [of termination]." *Id.* State and individual appellants argue that the second part of section 564m was meant to apply all Oregon water law, except that respecting abandonment of water rights by non-use, to the Tribe immediately upon the proclamation of termination.[36] We cannot accept this position. To do so would undermine the explicit command in the first part of section 564m that termination does not abrogate Klamath tribal water rights. For example, under appellants' interpretation of section 564m, after the proclamation in 1961 any water rights of the Tribe not perfected under the Oregon system, whether or not these rights were in actual use,

would be lost to the Tribe. *See, e.g.*, Ore. Rev. Stat. §§ 537.211-537.270, 537.410-537.450 (1981). Moreover, if all Oregon water law except the non-use provisions were applied to the Tribe in 1961, the Tribe's ability to appropriate its full measure of reserved water rights would be cut off because Oregon water law, unlike the law of federal reserved rights, has no provision to protect reserved but unappropriated waters.

In order to effectuate the Termination Act's explicit command that Klamath water rights survive unimpaired, we must interpret the second part of section 564m to mean that starting in 1976, fifteen years after the proclamation of termination in 1961, reserved water actually appropriated for use by members of the Tribe on allotments, could be lost under Oregon laws "with respect to abandonment of water rights by non-use." However, no other provision of Oregon water law that might preclude appropriation of the full measure of Klamath reserved water rights may be applied to the Tribe or its members consistently with the unequivocal language of protection in the first sentence of section 564m.[37] To hold otherwise would, sanction destruction of treaty rights in the absence of the required express Congressional approval. *See Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968) (abrogation of treaty rights not lightly

imputed to Congress in the absence of explicit statement); *accord*, *Kimball I*, 493 F.2d at 569; *United States v. State of Washington*, 520 F.2d 676, 693 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). *See generally* Comment, *The Water Rights of Klamath Indian Allottees*, 59 Ore. L. Rev. 299, 312-17 (1980).

*2. Non-Indian Successors to Allotted Reservation Lands.*

The district court held that:

> a non-Indian successor to an Indian allottee acquires an appurtenant right to water for the actual acreage under irrigation when he gets title from his Indian predecessor. The priority date of that right is 1864. The non-Indian also acquires a right, with an 1864 priority date, to water for additional acreage which he, with reasonable diligence, may place under irrigation.

478 F. Supp. at 349. The sole claim raised by the Tribe in its cross-appeal is to this aspect of the district court's decision.

The claim, however, is foreclosed by our recent decision in *Colville Confederated Tribes v. Walton*, 647 F.2d at 42. There we held that "[t]he full quantity of water available to the Indian allottee thus may be conveyed to the non-Indian purchaser." *Id.* at 51. The limitations on this transfer, recognized in *Colville* are, first, that the non-Indian successor's right to water is "limited by the number of irrigable acres [of former reservation lands that]

he owns," *id.*, and second, that the non-Indian purchaser may lose the right to that quantity of water through non-use. Thus, citing the district court's opinion in the instant case, in *Colville*, we limited a non-Indian successor to lands allotted to a member of the Colville Tribe to the amount of water used by the Indian predecessor plus additional water that "he or she appropriates with reasonable diligence after the passage of title." *Id*; *see United States v. Hibner*, 27 F.2d 909 (D. Idaho 1928).[38] Accordingly, the district court's decision on this point is affirmed.

*C. The United States' Water Rights in Former Klamath Reservation Lands.*

The district court did not determine the scope or priority of the Government's water rights on land it now owns within the former Klamath Reservation,[39] although the Government's claims had been developed fully in the record before the court. These Government lands constitute approximately 70% of the former reservation and include the Klamath National Wildlife Refuge and large portions of the Winema National Forest. Rather than determine the Government's water rights in these lands, however, the district court concluded:

> The protection of the Indians' hunting and fishing rights requires a natural streamflow through both the Marsh and forest lands on the former Reservation. The Indians' use of their rights to that streamflow will ensure that enough water

> flows through the Refuge and through the Winema National Forest within the former Reservation to fulfill the Government's purposes for those lands.
>
> It is therefore unnecessary to issue a separate declaration of Government water rights for the Refuge and forests of the Reservation.

478 F. Supp. at 347. The Government, in its brief, states that "while the court below assumed that fulfillment of the Indians' Article I rights will also satisfy all of the rights of the United States, this thesis was not asserted, much less established, before the district court." We agree.

The most significant water rights still held by the Klamath Tribe on former reservation lands are those that accompany their treaty hunting and fishing rights. *See supra* Section III(A)(1).[40] These rights are essentially nonconsumptive in nature. *Id.* Thus, to the extent that the United States now owns former reservation lands which may be benefited by a compatible nonconsumptive use of water, the Government may participate in the enjoyment of the Klamath's hunting and fishing water rights. *See United States v. Alpine Land Reservoir Co.*, 697 F.2d 851, 859-60 (9th Cir.) (discussing water right for recreation), *cert. denied, sub nom. Pyramid Lake Paiute Tribe of Indians v. Truckee-Carson Irrigation District*, 52 U.S.L.W. 3257 (U.S. Oct. 3, 1983) (No. 82-1723).

We must point out, however, that the Government has no ownership interest in, or right to control the use of, the Klamath Tribe's hunting and fishing water rights. The hunting and fishing rights from which these water rights arise by necessary implication were reserved by the Tribe in the 1864 treaty with the United States. *See supra* section III(A). The hunting and fishing rights themselves belong to the Tribe and may not be transferred to a third party. *See generally United States v. Montana*, 450 U.S. 544 (1981). Because the Klamath Tribe's treaty right to hunt and fish is not transferable, it follows that no subsequent transferee may acquire that right of use or the reserved water necessary to fulfill that use.[41]

It follows that the district court erred in concluding that it was unnecessary to determine the scope and priority of the Government's water rights in former reservation lands. Because, on the record below, these rights may be defined as a matter of federal law, we have concluded that a remand on this issue is unnecessary. *See Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813, 821 (9th Cir.), *cert. denied*, 456 U.S. 1011 (1982). The Government claims that its water rights in former reservation land derive from two sources. The first is its acquisition of land, together with appurtenant water rights, from Indian allottees. The second is its implied

reservation of water rights under the *Winters* doctrine. We conclude that the Government is entitled to claim rights as successor to Indian allottees. We further conclude that the Government may not claim further reserved water rights with an 1864 priority date. The Government has not asserted, and we thus do not decide, whether additional rights could have been reserved by implication pursuant to the Klamath Termination Act.

*1. Apppurtenant Water Rights.*

The Government acquired the former reservation lands by purchasing land from Indian allottees and condemning land held in trust for Indian allottees. *See supra* Section I. It is therefore entitled to the same appurtenant water rights as other non-Indian successors, subject to the limitations articulated in *Colville*. The priority date of these rights is 1864.

*2. Reserved Water Rights.*

The Government has argued that it reserved water rights in 1864 for Indian reservation purposes and converted those rights to forest and wildlife preserve purposes upon acquisition of beneficial interest in the land. We disagree.

The purpose of a federal reservation of land defines the scope and nature of impliedly reserved water rights. *See United States v. New Mexico*, 438 U.S. at 700. Because the reserved rights doctrine is an exception to Congress's explicit deference to state

water law in other areas, *see id.* at 715, the Supreme Court has emphasized the importance of the limitation of such rights to only so much water as is essential to accomplish the purpose for which the land was reserved. *Id.* at 700. We conclude that it would be inconsistent with the principles expressed in *United States v. New Mexico* to hold that the Government may "tack" a currently claimed *Winters* right to a prior one by asserting that it has merely changed the purpose of its previously reserved water right.

There is another reason why we must reject the Government's assertion that, by virtue of the water rights impliedly reserved in 1864, the Government owns a reserved right to water for forest and wildlife preserve purposes with an 1864 priority date. The government has claimed that the irrigation rights reserved in 1864 passed to it upon acquisition of former reservation land, and we have agreed. We have also held that the hunting and fishing rights reserved in 1864 are currently held by the Tribe. Thus, all water rights reserved in 1864 on land the Government now owns are accounted for. The Government cannot claim both that the reserved rights passed to Indian allottees and their successors and that the rights were retained by the United States.

The Government has not argued that Congress intended to reserve water rights for forest and wildlife purposes in enacting the Klamath Termination Act, and we express no opinion on the merits of such a claim. It is possible that, after the water rights to which we have held the Government to be entitled have been quantified, the Government will find that it has insufficient water to use former Klamath Reservation lands for the purposes Congress has designated. Congress, however, has the power to acquire the additional water the Government may need by explicitly exercising its consitutional [*sic*] authority under article IV, section 3. *See* U.S. Const. art. IV, 3.

*3. Klamath River Basin Compact.*

Finally, we address the contention of the State of Oregon and the individual defendants that the Government's acquisition of appurtenant water rights in former reservation land is limited by the Klamath River Basin Compact, Pub. L. No. 85-222, 71 Stat. 497 (1957). The Compact explicitly preserves Indian water rights, including irrigation rights that are more fully exercised after the Compact's ratification, from diminution. *See* Art. X, 71 Stat. at 505. The Compact further preserves all federal rights, powers and jurisdiction except as explicitly conceded. *See* Art. XI, *id.* We conclude that Congress did not intend to make the terms of

the Compact control the government's acquisition of Indian irrigation rights or the Tribe's continued enjoyment of hunting and fishing rights. *See Arizona v. California*, 373 U.S. 547, 566 (1963). These are the only water rights at issue here.

## IV

## CONCLUSION

After a careful review of the record in this case, we hold that the district court did not abuse its discretion in its exercise of jurisdiction to determine the scope and priority among the federal reserved water rights involved in this litigation. As to the district court's determination of these water rights issues, we affirm in all respects except the district court's decision not to declare separately the water rights of the United States on former reservation lands that it now owns. On this point, we modify the district court's judgment to incorporate the declaration of the Government's water rights within the former Klamath Reservation contained in Section III, part C of our opinion. As modified, the district court's opinion is AFFIRMED.

## FOOTNOTES

[1]The "reef" is a geologic formation that constricts the flow of the Williamson River at the downstream end of the Klamath Marsh. The "reef" is located near the town of Kirk, Oregon. Except for the upper reaches of some of its tributaries, the Williamson River drainage above the "reef" is entirely within the boundaries of the former Klamath Reservation. The only lands outside the former reservation, but within the area covered by the Government's suit, were certain parcels of land withdrawn by the United States from the public domain for national forest purposes. These withdrawals occurred in 1893, 1906, 1907 and 1930. *See* Act of Sept. 28, 1893, 28 Stat. 1240;

Act of Sept. 17, 1906, 34 Stat. 3231; Act of Jan. 25, 1907, 34 Stat 3270; Act of May 14, 1930, 46 Stat. 278.

[2]The McCarran Amendment waives the United States' sovereign immunity for the limited purpose of allowing the Government to be joined as a defendant in a state adjudication of water rights. The Amendment provides in full text:

> (a) Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.
>
> (b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.
>
> (c) Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

43 U.S.C. § 666 (1976).

[3]We believe that this obligation is heightened in a case where not only Indian property rights, including water rights, are involved, but where all rights to be adjudicated were reserved for the benefit of an Indian Tribe. *See, e.g., Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-68 (1974); *United States v. Kagama*, 118 U.S. 375, 384 (1886). *See also White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141-44 (1980); *Bryan v. Itasca Co.*, 426 U.S. 373, 388 n.14 (1976). This is because the federal policy of leaving Indians free from state jurisdiction and control is deeply rooted in our nation's history. *See McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 168 (1973); *Rice v. Olson*, 324 U.S. 788, 789 (1945). All of the water rights to be adjudicated by the federal court in this case derive from the "*Winters* doctrine" of reserved water rights. *See Winters v. United States*, 207 U.S. 564 (1908). They are water rights reserved to the Klamath Tribe by treaty and passed to subsequent Government, individual Indian, and non-Indian appropriators by operation of federal Indian law.

The only water rights addressed by the instant federal court suit lacking roots in the Klamath Treaty of 1864 or other aspects of federal Indian law are the water rights reserved by the Government to those parcels of land withdrawn from the public domain in 1893, 1906,

1907, and 1930. *See supra* note 1. Even these rights depend on the *Winters* doctrine and federal law of reserve water rights for a proper determination of their scope. The preference for a federal forum in which to litigate Indian rights governed by federal law has received express congressional approval in a number of statutory enactments. *See*, e.g., 25 U.S.C. §§ 345, 1322(b) (1976); 28 U.S.C. §§ 1360(b), 1362 (1976).

[4]In *Colorado River*, the United States filed suit in federal district court in November, 1972, pursuant to 28 U.S.C. § 1345 (1976), for a declaration of the water rights of the United States and certain Indian Tribes, as well as over 1000 individual water users. Shortly after commencement of the federal suit, one of the defendants in that suit sought to have the United States served as a defendant in a continuous state court water rights adjudication under the Colorado Water Rights Determination and Administration Act. The adjudication pursuant to the Colorado statute encompassed the entire drainage basin of which the area addressed by the federal suit was only a part. In early 1973, the United States was served in the state proceeding pursuant to the McCarran Amendment, 43 U.S.C. § 666 (1976). The defendants in the federal suit then moved to dismiss the action in favor of the state suit. The district court agreed that the doctrine of abstention required dismissal in deference to the state proceeding. The Tenth Circuit then reversed the district court's decision to abstain.

The Supreme Court, in reviewing the lower court decisions, agreed with the district court that the McCarran Amendment allows concurrent state and federal jurisdiction over water rights disputes, *see Colorado River*, 424 U.S. at 809, and that the state's jurisdiction extends to federal reserved water rights including Indian water rights. *See id.* at 809-13. The Supreme Court, while agreeing with the district court's decision to dismiss, rejected the district court's reliance on traditional abstention doctrine to justify dismissal. *Id.* at 813. Instead, the Court concluded that:

> [T]here are principles unrelated to considerations of proper constitutional adjudication and regard for federal-state relations which govern in situations involving the contemporaneous exercise of concurrent jurisdictions, either by federal courts or by state and federal courts. These principles rest on considerations of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation."

*Id.* at 817 (quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183 (1952)). The Court proceeded to analyze the "considerations of '[w]ise judicial administration'" in the *Colorado River* case that counseled dismissal of the federal action in favor of the state proceeding.

The most important factor in favor of dismissal was the McCarran Amendment itself, in which the Court found expressed a "clear federal policy" to avoid "piecemeal adjudication of water rights in a river system" where a comprehensive state system for adjudication of water rights is available. 424 U.S. at 819; *accord San Carlos Apache Tribe*, slip op. at 21-22. Of lesser importance, but consistent with the policies underlying the McCarran Amendment, the Court also found significant in its decision to uphold dismissal of the federal action:

> (a) the apparent absence of any proceedings in the District Court, other than the filing of the complaint, prior to the motion to dismiss, (b) the extensive involvement of state water rights . . . , (c) the 300-mile distance between the District Court in Denver and [the state water court located within the drainage under adjudication], and (d) the existing participation by the Government [in other proceedings under the Colorado water rights act].

*Id.* at 820 (footnote omitted). The Court found that together, these factors "justify the District Court's dismissal in this particular case." *Id.* (foothote omitted).

[5]While the Court's analysis in *Colorado River* of traditional abstention doctrine appears equally applicable to this case, the State argues that recent decisions have significantly expanded *Younger* abstention. *See Trainor v. Hernandez*, 431 U.S. 434 (1977); *Juidice v. Vail*, 430 U.S. 327 (1977). It also contends that the abstention discussed in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), should require dismissal of the federal district court case in favor of the state proceeding. We are not persuaded.

Unlike *Colorado River*, all claims raised in the federal suit here have their genesis in federal law. Thus we find no occasion to apply *Burford* abstention. As for *Younger* abstention, we note that while the complaint in the federal court proceedings sought declaratory and injunctive relief, the request for such relief was not aimed at restraining any state proceeding, nor did the federal plaintiffs seek a declaration as to the validity of any state law or regulation. *See Colorado River*, 424 U.S. at 816-17 (discussing abstention under the doctrine enunciated in *Younger v. Harris*, 401 U.S. 37 (1971)). Thus, even if the principles enunciated in Younger have been expanded by recent decisions of the Supreme Court, the instant case is not appropriate for Younger abstention because federal jurisdiction has not been invoked for the purpose of restraining state proceedings or invalidating a state law.

[6]Although the district court never expressly ruled on the motion to dismiss under *Colorado River*, the court's Pretrial Order and ultimate decision reflect consideration of the *Colorado River* factors.

At a September 13, 1976 hearing on defendants' motions to dismiss, the district court and counsel thoroughly discussed the *Colorado River* case and its application to the facts of this case. In the course of this hearing, the following colloquy between court and counsel occurred:

> The Court: I read the Colorado case and some of the other cases. I concluded that this Court does have jurisdiction; and probably the factual basis of the *Colorado River* case is not present here be ause of the limited jurisdiction of the State and because of other differences.
>
> I would probably deny the request to dismiss at this time. But I think the suggestion that this Court only decides the broad questions and that the State, if it would be willing to do it, would undertake the specific allocation of water, would be an excellent

determination and excellent result. I'm very much impressed with your statement [Mr. Biggs, counsel for the individual defendants] in your brief and reiteration of that position here today because I see no reason for anyone, including the Government, to spend money when the State is prepared to do it and where it has already accomplished a great deal.

When would the Government be ready to argue the legal questions?

Mr. Redd [counsel for the United States]: Your Honor, I think there is a preliminary step that needs to be done first. I think we have to first agree upon what the federal questions are that need to be decided. I think perhaps we should set down what we consider the federal questions to be in some sort of a memorandum.

The Court: . . . Before you leave, I think you can get together with him [Mr. Biggs] and maybe you can agree on What are the issues. I would like to have Mr. Israel [Counsel for the Tribe] in on this conference too because I think they have substantial rights. When I talk about Mr. Biggs, I am not excluding the Attorney General and Mr. Conn [counsel for individual defendants]; but if you could meet this afternoon before you return, I think it would be very productive. I hope that whatever you do, you decide to do it fairly quickly.

. . .

Mr. Redd: Could I make this suggestion, Your Honor.

The Court: Yes.

Mr. Redd: We are perfectly happy to meet with Mr. Biggs and Mr. Kruger and Mr. Israel and anybody else who is interested today. I will be here until — my plane leaves tomorrow morning at 11:00 o'clock. However, I think what we should do next is, we should submit a memorandum wherein we set out what we consider to be the agreed facts, what we consider to be the facts in which there are no agreements on, as we develop in our meeting and then our contentions of law and then our memorandum in support of our contentions. Mr. Biggs and the other defendants' attorneys could supply a list and date for trial which could be set for argument on that after you have the benefit of those briefs.

The Court: That's fine.

Out of this initial discussion grew the district court's Pretrial Order. Apparently, no formal denial of the defendants' motions to dismiss was ever entered.

[7]The State argues that this traditional test for an abuse of discretion should be replaced by a narrower test. This narrower test the State would have us apply derives from *Public Service Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237 (1952). In *Wycoff*, the plaintiff sought a declaratory ruling that it was involved in interstate

commerce. The Supreme Court held that it would be an abuse of discretion to issue such a ruling because the controversy before the court was too abstract. *Id.* at 245-48. The State argues that the district court's adjudication of water rights in this case is similarly abstract. We disagree. In this case there exists a genuine controversy which the district court could have resolved finally in every respect. The original complaint requested as relief

> [t]hat, upon final determination of the rights to the use of water of the United States and the rights to the use of water appurtenant to the lands described above and presently owned by defendants, this court appoint a water master to administer the Upper Williamson River system in accordance with the orders and directives of this court.

The duties of such a master would have included yearly allocation of specific quantities of water to the various parties to the federal suit. The United States only abandoned its request for such specific quantification of water rights and administration of the river system under a federal court decree upon the district court's suggestion that cooperation between state and federal courts would best be served if the federal court addressed only the legal principles governing the extent of and priority among water rights arising under federal law in the litigation area, and left quantification and administration of these rights to later proceedings to be conducted by the State Water Resources Director. *See* Or. Rev. Stat. §§ 539.040-539.140(1979).

We commend this effort to coordinate federal and state resolution of water rights. Any generality in the district court's order resulted from these coordinating efforts not from the abstract nature of the controversy. Unlike the situation in *Wycoff*, the plaintiff's request for relief as not one for "preliminary findings and conclusions intended to fortify the litigant against future regulation." 344 U.S. at 246. Rather, the district court properly decided those elements of a ripe controversy that were governed by federal law, while leaving state law issues necessarily involved in a detailed resolution of the controversy to subsequent state proceedings in order to harmonize the concurrent federal and state jurisdiction mandated by the McCarran Amendment, 43 U.S.C. § 666 (1976).

[8]We realize, of course, that where both the state and the federal proceedings are in their infancy at the time of a motion to dismiss the federal proceeding, both *Colorado River* and *San Carlos Apache Tribe* indicate that absent unusual circumstances, the federal court should defer to the state proceeding. *See San Carlos Apache Tribe*, slip op. at 20-23.

[9]The parties argue extensively over the meaning of the word "suit" in the McCarran Amendment. The Government and the Tribe may be technically correct when they suggest that the Oregon water adjudication system is not a "suit" but an administrative proceeding for which there is a form of judicial review. *See* Or. Rev. Stat. §§ 539.030, 539.150 (1979). However, the Supreme Court has warned against overly technical application of the McCarran Amendment. *United States v. District Court for Eagle County*, 401 U.S. 520, 525 (1971). Thus, although the Oregon water rights adjudication system is initially administrative and need not be judicial in nature, we will assume, without deciding, for the purposes of this case that it is not

too informal to qualify as a "suit" within the meaning of the McCarran Amendment or a "comprehensive state adjudication" within the meaning of *Colorado River* and *San Carlos Apache Tribe*, *see San Carlos Apache Tribe*, slip op. at 20, 23 & n.20.

[10]Although the Supreme Court's warning is cast in terms of whether the federal proceeding is well enough along at the time of a motion to dismiss, *see San Carlos Apache Tribe*, slip op. at 22, the institutional concerns of "wise judicial administration" must not be blind to the overall course of a particular piece of litigation. Judicial resources may as readily be wasted at the trial and appellate levels as at the stage of pre-trial proceedings.

[11]A determination of the priority among reserved water rights, similar to that undertaken by the district court, would require a separate proceeding in the state adjudication prior to the overall quantification of water rights in the Williamson River drainage. *See, e.g., Colorado River*, 424 U.S. at 825 (Stewart, J., dissenting); *United States v. New Mexico*, 438 U.S. 696, 70 3-04 (1978) (Government's claim of reserved water rights in New Mexico general stream adjudication referred out to special master for determination); *Avondale Irrigation Dist. v. North Idaho Properties, Inc.*, 99 Idaho 30, ___ & n.3, 577 P.2d 9, 11 n.3 (1978) (noting that the reserved rights of the United States were entered in a partial judgment rendered prior to "adjudicating the rights of the other parties."); *see also* Abrams, *Reserved Water Rights, Indian Rights and the Narrowing Scope of Federal Jurisdiction: The* Colorado River *Decision*, 30 Stan. L. Rev. 1111, 1125 (1978). Such a separate proceeding is necessary because reserved water rights are established by reference to the purpose of the reservation rather than any actual beneficial use of water. *See United States v. New Mexico*, 438 U.S. at 700; *Arizona v. California*, 373 U.S. 546, 599-600 (1963); *Winters v. United States*, 207 U.S. 564, 576 (1908). *See generally* F. Cohen, *Handbook of Federal Indian Law* 578-96 (1982 ed.). Because the State had begun no proceeding to determine the priority and extent of federal reserved water rights, the district court's decision to conduct the limited and separate ordering of water rights under federal law created little potential for conflicting state and federal court rulings.

For much the same reasons, the district court's exercise of jurisdiction did not enlarge the potential for duplication of judicial effort, or generate needless costly proceedings for the parties. The court recognized that the federal law issues it proposed to resolve could be addressed in the state administrative adjudication of water rights in the Klamath Basin. The court also recognized, however, that such a state administrative determination of federal reserved water rights could be avoided by a prior federal court adjudication. Accordingly, the district court concluded that its resolution of the federal questions raised by the United States' suit would not add an otherwise unnecessary step in the judicial proceedings for establishing water rights in the Klamath Basin. We agree with the district court's conclusion on this point; its allocation of water rights under federal law neither duplicated an on-going state court proceeding nor added a proceeding that the state court would not ordinarily conduct.

In fact, the district court exercised its jurisdiction in a manner to avoid *any* direct adjudication of state water rights. Within the federal litigation area all claimants derive their asserted water rights from

federal law. The district court recognized this unique aspect of the federal suit and decided only the priority among these federal law-created rights. As the Supreme Court noted in *Moses H. Cone Memorial Hospital v. Mercury Construction*, 103 S.Ct. at 941, where "federal law provides the rule of decision on the merits" for all of the issues under adjudication, dismissal under the rationale of *Colorado River* is disfavored. *See* also Will v. Calvert Fire Ins. Co., 437 U.S. at 667 (Blackmun, J., concurring); id. at 667-68 (Brennan, J., dissenting). Thus, we have no doubt that the district court's decision was proper under the standards set forth in *Colorado River*.

[12]In *Colorado River*, the Supreme Court recognized four secondary factors, less important than the McCarran Amendment policy, that also favored dismissal. First, the Court suggested that the absence of any proceedings in the district court, other than the filing of a complaint, prior to the motion to dismiss, was a factor that favored dismissal. 424 U.S. at 820. This factor, to the extent that it is important, seeks to avoid waste or duplication of judicial effort. As we have noted, in the instant case, the district court recognized the potential for waste and tailored its exercise of jurisdiction to avoid adjudication of issues that would also arise subsequently in the state forum. Second, in *Colorado River*, the "extensive involvement of state water rights" counseled dismissal. 424 U.S. at 820. There, "the Government asserted reserved rights on its own behalf and on behalf of certain Indian tribes, *as well as rights based on state law*." Third, the state water court in *Colorado River* was some 300 miles closer than the federal court to the water system under adjudication. 424 U.S. at 805. The inconvenience to the parties occasioned by this distance favored proceeding in the state court. Here, the federal court normally sits in Portland, although it is authorized to sit in Medford and Klamath Falls, Oregon, both communities quite close to the Williamson River. In fact, the district judge offered to conduct the suit in either Medford or Klamath Falls. None of the parties urged a change of location, so we may assume that the inconvenience, if any, of proceeding in Portland was minimal. Finally, in *Colorado River*, the Supreme Court found "participation by the Government in Division 4, 5, and 6 proceeding," a factor that favored dismissal of the federal suit in order to encourage Government participation in Division 7 water rights proceedings. 424 U.S. at 820. The State argues that dismissal is similarly appropriate here to encourage the United States to participate in state stream adjudications. Although there is no statewide system in Oregon directly analogous to the Colorado System, Oregon has a water rights adjudiction process that may be applied to any stream. *See* Or. Rev. Stat. 539.010-539.110 (1979). The State argues that the approximately 4,000 Government filings under the state system for determining water rights meets the Government participation factor in *Colorado River*. Even if the State is correct on this point, we do not find Government participation standing alone, sufficiently weighty to require dismissal of the United States efforts to secure a limited adjudication of federal water rights in a federal court.

[13]*See also* W. Canby, *American Indian Law* 245-46 (1981) ("While the purpose for which the federal government reserves other types of lands may be strictly construed, *United States v. New Mexico*, 438 U.S. 696 (1979) (national forest), the purposes of Indian reservations are necessarily entitled to broader interpretation if the goal of Indian

self-sufficiency is to be attained."). Additionally, where interpretation of an Indian treaty is involved, not only the intent of the Government, but also the intent of the tribe must be discerned. *See Washington v. Fishing Vessel Ass'n*, 443 U.S. 658, 675-76 (1979).

[14]The central importance of the Tribe's hunting and fishing rights is confirmed by reference to the historical fact that at the time the 1864 Treaty was negotiated, the Tribe

> hunted and trapped throughout the area set aside in [the] treaty . . . . They hunted and ate grizzly bear, brown bear, deer, elk, antelope, beaver, racoon, badger and the Modoc also hunted and ate fox, coyote, wolf, puma, wildcat, skunk, porcupine, rabbit, groundhog and gopher. The Klamath Tribe also hunted coyotes, grey-wolves, foxes, badgers, wildcats, rabbits and various fur-bearing animals which furnished blankets and clothing and swans, geese, ducks and wading birds, the majority of which were used by the tribes as food in various ways, the skins of swans, geese, and other birds with especially fine down being made into feather blankets, swaddling clothes, etc.
>
> Plaintiffs are known to have had a large number of methods of hunting, including driving game into the water or mud, or surrounding it by fire; they trapped game by nooses above the trail (including deer and other large game), and as to birds by nooses held on a stick or suspended from a cord. They netted game, and captured deer and other game in pitfalls; they hunted from booths and blinds and from brush fences or enclosures, and ambushed game from pits and from dugouts run into tules. In hunting they disguised themselves by wearing animal heads and entire skins; they used flares or jacklights to attract waterfowl; they imitated cries of the game, including imitating the cries of a fawn; and they smoked bears out of their dens.

*Klamath and Modoc Tribes v. Maison*, 139 F.Supp. at 636-37.

[15]In fact, the Government was probably aware that hunting and fishing held the greatest promise for sustaining the Klamath on their reservation:

> The land of the Modoc and Klamath Lake Indians is a high, cold plain, nearly on a level with the summit of the Sierra Nevada mountains, too frosty to raise cereal or roots with success, and fit only for grass. The country abounds in wild game and the lakes and streams in fish. The Indians make a good living and raise a great many horses . . . .

1864 Report of the Commissioner of Indian Affairs 121.

[16]The order creating the Colville Reservation read:

> It is hereby ordered that . . . the country bounded on the east and south by the Columbia River, on the west by the Okanogan River, and on the north by British possessions, be, and the same is hereby, set apart as a reservation for said Indians, and for such

other Indians as the Department of the Interior may see fit to locate thereon.

*Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981) (quoting Executive Order of July 2, 1872, reprinted in 1 Kappler, *Indian Affairs and Treaties* 916 (2d ed. 1904)).

[17]3 W. Hutchins, *Water Right Laws in the Nineteen Western States* 440-74 (1971); 5 R. Clark, Waters and Water Rights § 400, at 3-4 (1967).

[18]*See, e.g., Colorado River Water Conservation District v. Rocky Mountain Power Co.*, 158 Colo. 331, ___ , 406 P.2d 798, 799-801 (1965) ("there is no support in the law of this state for the proposition that a minimum flow of water may be 'appropriated' in a natural stream for piscatorial purposes without diversion of any portion of the water 'appropriated' from the natural course of the stream"); *State ex rel. State Game Commission v. Red River Valley Co.*, 51 N.M. 207, ___ , 182 P.2d 421, 427-32 (1945) (state law does not allow appropriation of waters flowing in a stream for fishing purposes).

For other cases stating that some form of diversion is required to effect an appropriation, see, eg., *Rodgers v. Pitt*, 129 F. 932, 939-40 (D.Nev. 1904); *Crawford v Lehi Irrig. Co.*, 10 Utah 2d 165, 168, 350 P.2d 147, 150 (1960); *Sherlock v. Greaves*, 106 Mont. 206, 216, 76 P.2d 87, 90 (1938). *See also* 1 W. Hutchins, *Water Rights Laws in the Nineteen Western States* 371 (1971). We note, however, that the modern trend in prior appropriation states is to recognize water rights in a natural body of water where the water in its natural state is a source of significant economic benefits. *See Colorado River Water Conservation District v. Colorado River Water Conservation Board*, Colo. ___ , ___ , 594 P.2d 570, 574 (1979) (applying 1973 Colorado statute); *State Department of Parks v. Idaho Department of Water Administration*, 96 Idaho 440, ___ , 530 P.2d 924, 928-29 (1974) (applying 1971 Idaho statute).

[19]The fact that water rights of the type reserved for the Klamath Tribe are not generally recognized under state prior appropriations law is not controlling as federal law provides an unequivocal source of such rights. The Supreme Court decisions in *New Mexico* and *Cappaert* establish beyond any doubt that the *Winters* doctrine is a source of rights to a streamflow, *see New Mexico*, 438 U.S. at 718, and to a given volume of water in a natural pond, *see Cappaert*, 426 U.S. at 143. The Court in those cases found no need to look for a state law basis for the rights it upheld. Rather, a careful reading of the cases confirms that the water rights recognized were defined by federal, not state, law. *See New Mexico*, 438 U.S. at 713 n.21 (suggesting that such a federal right could even now be created by Congress without any overt appropriation, even though the right would take its priority from state law); *id.* at 715 ("reserved rights doctrine is a doctrine built on implication and is an exception to Congress' explicit deference to state water law in other areas"); *Cappaert*, 426 U.S. at 145 ("[f]ederal water rights are not dependent upon state law"); *see also United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 859-60 (9th Cir.), *cert. denied, sub nom. Pyramid Lake Paiute Tribe of Indians v. Truckee-Carson Irrigation District*, 52 U.S.L.W. 3257 (U.S. Oct. 3, 1983) (No. 82-1723).

This is not to say, however, that the Tribe's rights are unaffected by state law. Specifically, the priority of the right is, in part, determined by state law, *see New Mexico*, 438 U.S. at 713 n.21, and the precise quantity of water protected must be determined in accordance with state techniques and procedures, *see Colorado River*, 424 U.S. at 804-05, 819 (approving use of "comprehensive state systems" for quantification of water rights). This blend of federal and state law to adjudicate water rights has had recent application by the Supreme Court. *See Colorado v. New Mexico*, 103 S.Ct. 539 (1982) (combination of prior appropriation and equitable apportionment doctrines).

[20]Appellants cite language from subsection 28(c) of the 1958 amendments to the Termination Act, 72 Stat. 817. Subsection (c) details the method for appraising the fair market value of Klamath Reservation lands: "each appraiser shall estimate the fair market value of such forest units and marshlands *as if they had been offered for sale on a competitive market without limitation on use* . . . ." *Id.* (emphasis added.) These appraisal instructions cannot be read to dictate the substantive conditions of termination.

[21]The reserved water rights doctrine enunciated in *Winters v. United States*, 207 U.S. 564 (1908), was well recognized by the early 1950's. *See, e.g., United States v. Walker River Irrig. Dist.*, 104 F.2d 334, 339-40 (9th Cir. 1939); *Conrad Investment Co. v. United States*, 161 F. 829, 831 (9th Cir. 1908); *see also Federal Power Comm'n v. Oregon*, 349 U.S. 435, 444 (1955); *United States v. Ahtanum Irrig. Dist.*, 236 F.2d 321, 325 (1956), *cert. denied*, 352 U.S. 988 (1957).

[22]In the present case, the Klamath Tribe, as we have noted, has depended upon the waters in question to support its hunting and fishing activities for over 1,000 years. It would be inconsistent with the principles we follow in today's decision to hold that the priority of the Tribe's water rights is any less ancient than the "immemorial" use that has been made of them. *See United States v. Shoshone Tribe*, 304 U.S. 111, 117, 58 S.Ct. 794, 798, 82 L.Ed. 1213 (1938); F. Cohen, *Handbook of Federal Indian Law 591 & n. 100 (1982)*

[23]For a thoughtful argument that this case understates the scope of tribal reservations by treaty of an interest in an environmentally sensitive resource, *see* Comment, *Indian Fishing Rights Return to Spawn: Toward Environmental Protection of Treaty Fisheries*, 61 Ore. L. Rev. 93 (1981).

[24]Appellants argue vigorously that the Tribe can no longer hold a water right to support its treaty hunting and fishing rights because the Tribe no longer owns land to which this water right is appurtenant. Their argument, however, misperceives the history and nature of the Klamath's reserved water rights.

In 1864, when the Klamath Reservation was created and water was impliedly reserved for the benefit of the Tribe, the Indians owned appurtenant land. *See United States v. New Mexico*, 438 U.S. 696, 698 (1978). The issue is whether these water rights, once reserved, are terminated by a transfer of the appurtenant land. We have already held in *Kimball I* that the Tribe's hunting and fishing rights guaranteed by the treaty survived despite the land transfer. 493 F.2d at 569-70. To find that the water rights necessary to give meaning to these hunting and fishing rights have been lost because the Tribe has

disposed of the appurtenant land would effectively overrule the *Kimball* decisions. We refuse to do so.

[25]The water rights of Indian irrigators, as the district court noted, are subordinate to the Tribe's right to water for support of its hunting and fishing lifestyle. 478 F.Supp. at 346. This hierarchy among Indian water rights arises, not from any implication in the 1864 treaty that the purpose of hunting and fishing should predominate over any of the other purposes for which the Klamath Reservation was established, but rather from the analytically separate question of what priority date for appropriation the various water rights reserved in the treaty carry. Analysis of this latter question, under the unique circumstances of this case, leads to the conclusion that the Tribe's hunting and fishing water rights carry an earlier priority date for appropriation, because of historical use, than do water rights for irrigation. *See supra* section III(A)(3).

[26]Termination of the Klamath Reservation was proclaimed on Aug. 10, 1961. *See* 26 Fed. Reg. 7362 (1961) (proclamation of James K. Carr, Acting Sec. of Interior, terminating the federal trust relationship with the Klamath Tribe pursuant to 25 U.S.C. § 564q (1976)). Thus according to the second part of section 564m, Oregon law "with respect to abandonment of water rights by nonuse" became applicable to the Tribe and its members in August of 1976.

[27]This result is consistent with our statement in *Colville Confederated Tribes v. Walton* to the effect that:

> [t]he district court's holding that an Indian allottee may convey only a right to the water he or she has actually appropriated with a priority date of actual appropriation reduces the value of the allottee's right to reserved water. We think this type of restriction on transferability is a "diminution of Indian rights" that must be supported by a clear inference of Congressional intent.

647 F.2d at 50.

[28]The district court correctly ruled that, like the water rights of Indian irrigators, the rights of their non-Indian successors are subordinate to tribal hunting and fishing water rights. *See* 478 F.Supp. at 350; *see also supra* note 30.

[29]The district court did determine the Government's water rights in forest lands outside of the reservation. *See* 478 F.Supp. at 347-48. The district court's substantive conclusions on that issue have not been challenged on appeal.

[30]We do not mean to imply, of course, that the tribe holds no other water rights or that some of these rights may not be significant in a particular setting.

[31]A forceful argument can be made that the Klamath's hunting and fishing water rights should not be treated differently from other reserved water rights, such as those for irrigation. Under this view, the Tribe's hunting and fishing water rights would be transferrable to the United States. *Cf. Colville Confederated Tribe v. Walton*, 647 F.2d at 50-51 (transfer of reserved irrigation water rights). We decline to adopt this analogy, however, because even when the Tribe transfers the land to which the hunting and fishing water rights might be said

to be appurtenant, it is the Tribe and its members, not some third party, that retains the right to hunt and fish and needs water to support that right. Where the Tribe transfers land without reserving the right to hunt and fish on it, there is no longer any basis for a hunting and fishing water right. For this reason, we find the Klamath Tribe's hunting and fishing water rights virtually unique and not subject to the ordinary rules of transfer and change of use. *See* F. Cohen, *Handbook of Federal Indian Law* 592-96 (1982 ed.) (discussing transfer and change in use of Indian reserved water rights); *see also* D. Getches, *Water Rights on Indian Allotments*, 26 S.D. L. Rev. 405 (1981) (criticizing transfer of reserved water rights rule adopted by this court in *Colville Confederated Tribe v. Walton*).

## APPENDIX C

**ORS 539.130 Findings of fact and determination of director; certification of proceedings; filing in court; fixing time for hearing by court; notice; force of director's determination.** (1) As soon as practicable after the compilation of the data the Water Resources Director shall make and cause to be entered of record in his office findings of fact and an order of determination determining and establishing the several rights to the waters of the stream. The original evidence gathered by the director, and certified copies of the observations and measurements and maps of record in his office, in connection with the determination, as provided for by ORS 539.120, together with a copy of his order of determination and findings of fact as they appear of record in his office, shall be certified to by him and filed with the clerk of the circuit court wherein the determination is to be heard. A certified copy of the order of determination and findings shall be filed with the county clerk of every other county in which the stream or any portion of a tributary is situated.

(2) Upon the filing of the evidence and order with the court the director shall procure an order from the court, or any judge thereof, fixing the time at which the determination shall be heard in the court, which hearing shall be at least 40 days

subsequent to the date of the order. The clerk of the court shall, upon the making of the order, forthwith forward a certified copy to the director by registered mail.

(3) The director shall immediately upon receipt thereof notify by registered mail each claimant or owner who has appeared in the proceeding of the time and place for hearing. Service of the notice shall be deemed complete upon depositing it in the post office as registered mail, addressed to the claimant or owner at his post-office address, as set forth in his proof theretofore filed in the proceeding. Proof of service shall be made and filed with the circuit court by the director as soon as possible after mailing the notices.

(4) The determination of the director shall be in full force and effect from the date of its entry in his records, unless and until its operation shall be stayed by a stay bond as provided by ORS 539.180.

**ORS 539.150 Court proceedings to review determination of director.** (1) From and after the filing of evidence and order of determination in the circuit court, the proceedings shall be like those in an action not triable by right to a jury, except that any proceedings, including the entry of a judgment, may be had in vacation with the same force and effect as in term time. At any time prior to the hearing provided for in ORS 539.130, any party or

parties jointly interested may file exceptions in writing to the findings and order of determination, or any part thereof, which exceptions shall state with reasonable certainty the grounds and shall specify the particular paragraphs or parts of the findings and order excepted to.

(2) A copy of the exceptions, verified by the exceptor or certified to by the attorney for the exceptor, shall be served upon each claimant who was an adverse party to any contest wherein the exceptor was a party in the proceedings, prior to the hearing. Service shall be made by the exceptor or the attorney for the exceptor upon each such adverse party in person, or upon the attorney if the adverse party has appeared by attorney, or upon the agent of the adverse party. If the adverse party is a nonresident of the county or state, the service may be made by mailing a copy to that party by registered mail, addressed to the place of residence of that party, as set forth in the proof filed in the proceedings.

(3) If no exceptions are filed the court shall, on the day set for the hearing, enter a judgment affirming the determination of the Water Resources Director. If exceptions are filed, upon the day set for the hearing the court shall fix a time, not less than 30 days thereafter, unless for good cause shown the time be extended by the court, when a hearing will be had upon the exceptions. All parties may be

heard upon the consideration of the exceptions, and the director may appear on behalf of the state, either in person or by the Attorney General. The court may, if necessary, remand the case for further testimony, to be taken by the director or by a referee appointed by the court for that purpose. Upon completion of the testimony and its report to the director, the director may be required to make a further determination.

(4) After final hearing the court shall enter a judgment affirming or modifying the order of the director, and may assess such costs as it may deem just. An appeal may be taken to the Court of Appeals from the judgment in the same manner and with the same effect as in other cases in equity, except that notice of appeal must be served and filed within 60 days from the entry of the judgment.

## APPENDIX D

Exhibit A

STATE OF OREGON ) ss. AFFIDAVIT
)
County of Marion )

I, Chris L. Wheeler, being first duly sworn, say that I am the Deputy Director of the Water Resources Department of the State of Oregon, and that I have held this position since the creation of the Department July 1, 1975. The Water Resources Department was created by merger of the former departments of State Engineer and Oregon Water Resources Board, both of which were abolished effective with the creation of the new Department. Prior to the merger, I held the position of State Engineer of Oregon for 13 years. In my capacity as State Engineer, I was responsible for the administration of the Water Rights Act and the adjudication of all of the relative rights to the use of water of all lakes, springs, streams, ground water bodies or other sources of supply.

In 1909, the State of Oregon provided a system for the regulation, control, distribution, use, and right to the use of water, and for the determination of existing rights within the State of Oregon (Ch 216, Oregon Laws 1909) and now referred to as the Water Rights Act. ORS 537.010.

In support of the Motion to Intervene and Dismiss, I make allegations and submit factual information and exhibits as

(a) A state adjudication of the water rights of the entire Klamath River and its tributaries has already been instituted by the State of Oregon.

(b) The Klamath River and its tributaries is the largest basin in eastern Oregon which has not been adjudicated. It has however had previous determinations on several tributaries: Anna Creek; Cherry Creek; Lost River; that portion of the Sprague River outside the boundaries of the former Klamath Indian Reservation, that part of the Wood River outside of the former Klamath Indian Reservation, and the Swan Lake closed basin. The stream has been in need of determination of its relative rights for many years and several requests have been received. The provisions of the Klamath Termination Act (68 Stat. 718 as amended) introduced certain questions. Section 14 provides that the laws of the State of Oregon pertaining to the abandonment of water rights should not apply to the Klamath Indians for 15 years from the date of the Proclamation to be issued by the Secretary of Interior. The Secretary did not issue such proclamation until August 13, 1961. It is clear that no effective adjudication could have been carried out

prior to the end of the 15-year period or August 13, 1976.

(c) The state proceeding, pursuant to Oregon's Water Code, formally started with publication of the notice on January 15, 1976, to all persons in the area who may claim a right to the beneficial use of the waters of Klamath River and its tributaries in Klamath, Lake and Jackson Counties, Oregon.

(d) Such adjudication has been in the planning of the Department for several years with preliminary investigations of water rights within the reservation being carried out by the State Engineer in cooperation with the Klamath River Compact Commission. The investigation covered a point need of the Commission for determination of level of development and by the State Engineer to determine all water uses to be considered in the adjudication. Plans were also included in the budget request of the State Engineer prepared in 1974 and submitted to the 1975 legislature.

(e) The intention to proceed with the Klamath adjudication in the biennium was approved by the Executive Department, Budget Division and included in the Governor's budget. In the budget presentation to Subcommittee No. 6 of the Ways and Means Committee of the 1975 legislature, plans for the Klamath adjudication were esplained [*sic*]. As additional preliminary work the State Engineer

installed gaging stations in the NE 1/4 SE 1/4, Section 1, Township 31 South, Range 10 East, W.M. in 1973. These stations have been operated by the Department since that date collecting part of the basic data that will be essential for the adjudication.

(f) There are several thousand individual water right owners in the Klamath Basin operating today under water rights issued and regulated by the Water Resources Department. These rights will have to continue to be administered by the Department in the future. It should therefore carry out the remainder of the adjudication of all of the relative rights to the use of the water in the Klamath Basin as provided in the adjudications procedure which it has initiated.

(g) The adjudication by the federal court of a small part of the rights would be incomplete and have very little value in providing a lasting solution to a potential conflict between the United States of America in behalf of the Fish and Wildlife Service of the Department of Interior and the United States Forest Service of the Department of Agriculture and other users of the system. The Williamson River near Klamath Agency provided an average annual runoff for the past 20 years of 155,800 acre feet of water which is a substantial part of a water supply for downstream irrigation projects including those of the Modoc Point Irrigation District (formerly Kla-

math Indian Irrigation Project) and the Klamath Project constructed by the U.S. Bureau of Reclamation. It is also a significant part of the water supply for natural purposes in Klamath Lake. None of the downstream users whose rights may be injured were made a part of the suit in federal court and they number in the thousands.

(h) The United States has filed applications for permits or joined in adjudications of water rights in the Klamath River Basin. These total about 170 in the Basin covering many purposes for the United States Forest Service, Bureau of Indian Affairs, and National Park. Some of these that are of special interest are discussed below.

(i) The State of Oregon enacted special legislation in 1905 (chapter 228) to permit notice of intent to appropriate water to be filed with the State Engineer. On May 19, 1905, the United States filed with the Oregon State Engineer a "Notice of Intention to Utilize all waters of the Klamath Basin." In 1908 and in 1909 the United States filed plans and specification for the Klamath project and proof of authorization for construction.

(j) On December 7, 1912, the State Engineer began his investigation for purposes of adjudicating the Lost River that culminated in a Decree of the Circuit Court for Klamath County dated September 12, 1918. Most of the waters of the Lost River are

consumed within the basin. The Lost River, in its natural state, was tributary to the Klamath River through the swamps north of Lower Klamath Lake. After development the Lost River discharges to Klamath River through the Lost River Flood Channel or the Klamath Straits Drain. The United States, having initiated rights under Oregon law by posting and filing of notices, participated in the proceedings and obtained from the Circuit Court of Klamath County, by the decree, inchoate rights for its Lost River Reclamation plan as follows:

Miller Creek and Gerber Reservoir for 21,000 acres in Bonanza sub-project;

Lost River and Clear Lake Reservoir for 13,000 acres in Modoc unit in Oregon;

Lost River and Clear Lake Reservoir for 2,000 acres in second unit Klamath Project;

Lost River and Clear Lake Reservoir for 2,000 acres in Tule Lake Bed in Oregon;

Lost River and Clear Lake Reservoir for 13,000 acres in Modoc Unit in California;

Lost River and Clear Lake Reservoir for 14,000 acres in Tule Lake Bed in California.

(k) In addition there have been many water right application filings with the State of Oregon by individual Indian allottees or their successors and also similar filings by the Bureau of Indian Affairs and the U.S. National Bank as trustee for the remaining members of the Klamath tribes.

(L) The area covered by the proposed federal court adjudication lies entirely within the area included in the pending state adjudication. See Exhibit "B" showing an outline of the Klamath River Basin, the area covered by the proposed federal adjudication and the areas previously adjudicated by the Water Resources Director (State Engineer). The average annual inflow to Upper Klamath Lake from a drainage area of 3,796 square miles is approximately 1,420,40 acre feet. See Exhibit "D", a pictorial diagram of the relative stream flows in the area. The Williamson River above the reef near Kirk comprises approximately 11% of the total annual yield of the Klamath River Basin.

(m) Adjudication of the water rights of the Williamson River and its tributaries in federal court would result in piecemeal, duplicative, perhaps conflicting determination of water rights which are already the subject of a larger adjudication by the state of the water rights of the entire Klamath River watershed.

(n) State adjudication will be significantly more economical both for the private parties and for the government. The state has a comprehensive administrative system for the determination of water rights under which the expenses, including among others, engineers, hydrologists and water masters,

are paid for by the state out of general fund revenues. Except for the very small percentage of property owners who contest the findings made by the Water Resources Director (experience shows this to be less than five per cent), there is no need to engage attorneys to protect an individual property owner's rights. This is in contrast to federal court where every named party usually engages an attorney to represent him to affirmatively assert his rights and where the expenses of a referee, water master, and expert hydrological witnesses must be borne by the parties themselves. In summary, the state has a self-executing water rights adjudication system; the federal government does not.

(o) The Water Resources Director is charged with making detailed and extensive studies of all water resources, use, claims of rights for the use of water, hearing all contests of those claims, and preparing and adopting findings of fact and order of determination of all relative rights to the use of the waters of the particular stream system involved. The final order of determination is filed with the circuit court of Oregon for the county wherein the watershed or principal portion thereof is located and a hearing before the circuit court provided. The court must hear any objections and enter its decree in the matter which is then subject to appeal through the usual appeal process. If there are no objections, the

court enters its decree affirming and adopting all parts of the Director's order of determination. The State of Oregon adjudication system for determination of vested water rights summarized step by step in Exhibit "C".

(p) The federal government has previously participated in state water rights adjudications and has made approximately 4,000 state filings for water rights in the State of Oregon which includes many in the Klamath River Basin.

(q) The Klamath River Compact (71 Stat. 497) entered into in 1957 between the states of Oregon and California and approved by Congress provides in substance as follows:

(1) Determines the respective rights of the States;

(2) Determines priorities;

(3) Allows the State to adjudicate its own waters;

(4) Lands within the former Indian Reservation are included in Oregon allocation of water;

(5) Recognizes vested water rights;

(6) Provision made for wildlife refuges except the Klamath Forest National Wildlife Refuge.

Piecemeal federal adjudications within the Klamath River Basin are contrary to both the letter and the spirit of the Klamath River Compact.

(r) Pursuant to the McCarran Amendment (43 U.S.C. § 666) the United States has been served in

the state adjudication. It is a party to the state proceeding.

(s) Since the complaint was filed in the action by the United States there have been no substantive proceedings undertaken.

(t) The area involved is over 230 miles from the federal court in Portland. It is 279 miles from Klamath Falls to Portland. The federal court has no convenient method of assembling the tremendous amount of information necessary to resolve the issues involved. The state, on the other hand, has over 67 years of experience in water rights adjudications and administration with a well established system that protects all of the legal rights of all of the water users at a minimum of cost and expense. After the adjudication, the Water Resources Department will provide for administration of all water rights through its water master located in Klamath Falls which is within the water district covering the Klamath River Basin.

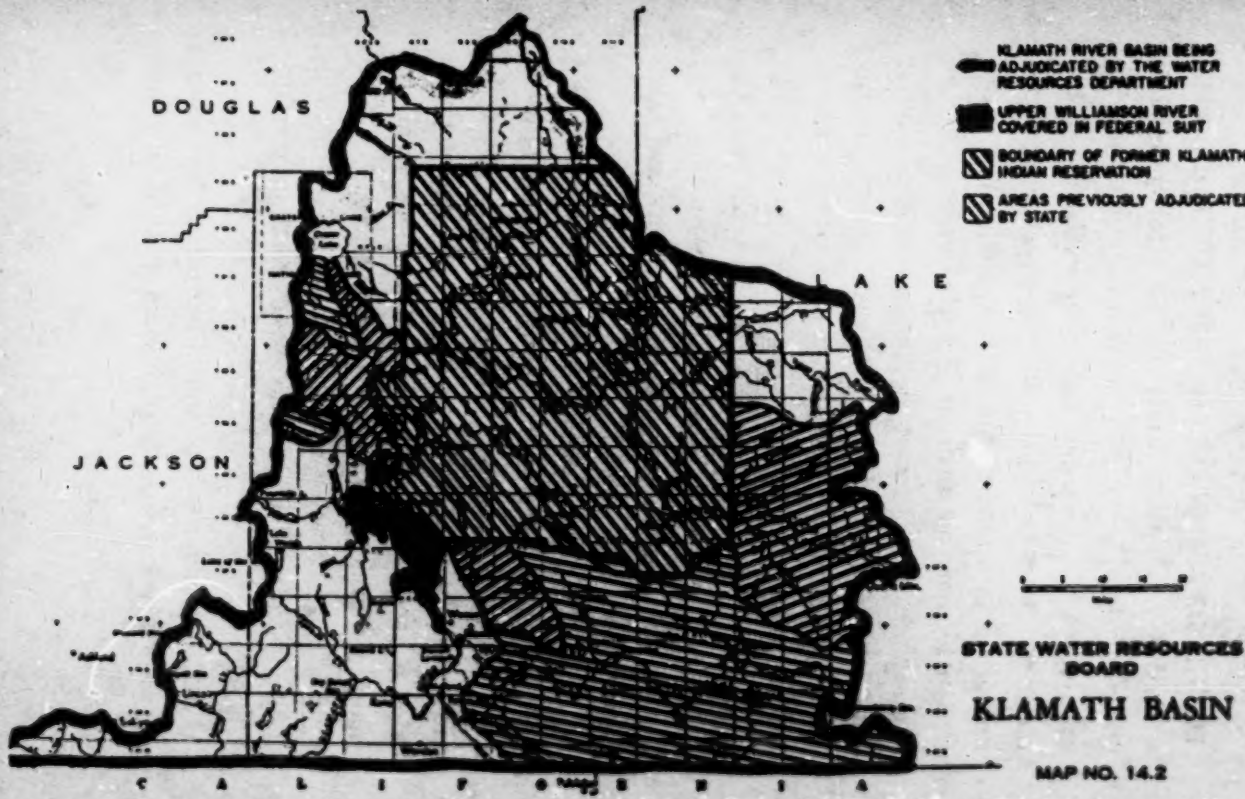
(u) State adjudication and administration provide for an on-going process for filing subsequent water rights, the establishment of priorities and the enforcement thereof.

(v) The Termination Act of the Klamath Indian Reservation provided for a moratorium of fifteen years as to the application of the laws of the State of Oregon in relation to abandonment of water rights.

Pursuant to the Termination Act a proclamation was made effective on the 13th day of August, 1961, and provided that the laws of the State of Oregon shall apply to the tribe and its members in the same manner as it applies to other citizens within its jurisdiction.

(w) The issues involved in the federal suit will also have to be determined in the state adjudication. Any determination by the federal court of rights in the Williamson River will affect thousands of downstream users who have not been made parties to the case and who will not be bound by any decree which might be entered. Continuation of the federal suit would result in duplicatory issues which could be resolved in a single proceeding.

[Signature and certification omitted in printing]




App-111
Exhibit B

Exhibit C

SUMMERY OF STATUTORY PROCEDURE FOR DETERMINATION OF VESTED WATER RIGHTS

*STEP 1.* Water Resources Director publishes notice of date he will begin investigation into the relative rights of various claimants to the use of the water of a stream and the date by which all persons intending to claim rights to the use of the water shall file their notification of such interest. At the same time the Director begins sending a similar notice by registered mail to each person having lands bordering on such stream or having access to its waters (ORS 539.030).

*STEP 2.* At State expense the Director does the necessary field work to determine stream flows and use of water, making appropriate surveys and maps of such use (ORS 539.120).

*STEP 3.* Director publishes notice of the time and place of the taking of testimony as to the rights of the various claimants. The Director also sends by registered mail a similar notice to all persons who filed a notification of intent and includes forms for making claims (ORS 539.040 and 539.050).

*STEP 4.* Director on dates and places stated in notice receive claims and take testimony (ORS 539.070).

*STEP 5.* Upon completion of receiving testimony, Director gives notice by registered mail of time and

place of public inspection of claims and testimony (ORS 539.090).

*STEP 6.* Claimants within 15 days, or an extension thereof, file contests and serve contestee (ORS 539.100).

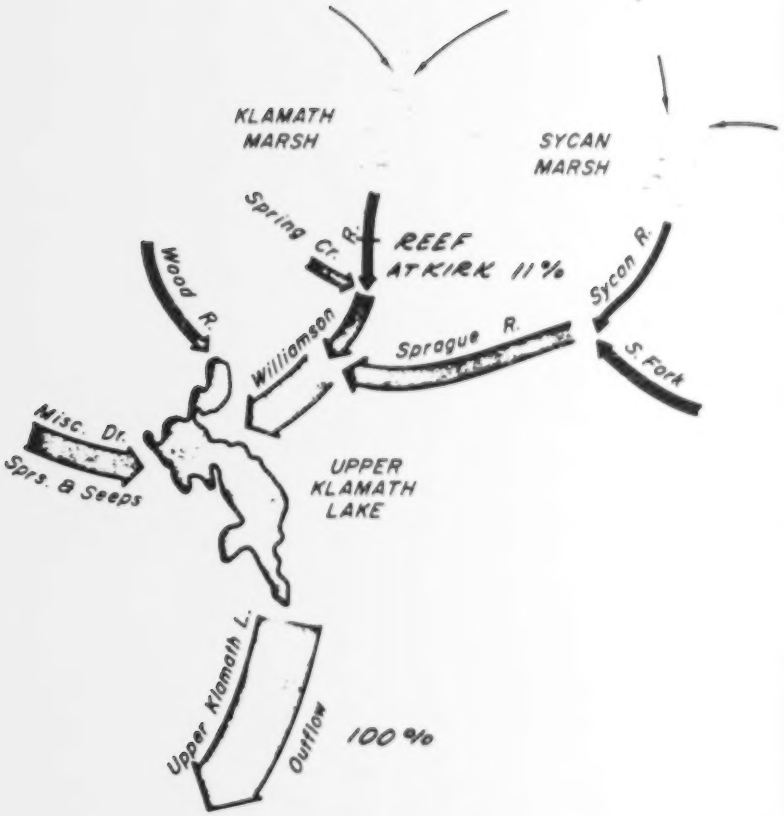
*STEP 7.* Director hears and determines contests at a time fixed by him. Director may issue subpoenas, order the taking of depositions and tax costs of witness fees as in suits in equity (ORS 539.110).

*STEP 8.* Director after compilation of data and hearing all contests enters an order, including findings of fact, determining and establishing the several right to the waters of the stream.

*STEP 9.* Director files in the Circuit Court of county his order, the claims, the evidence taken, the maps prepared by him, his measurements and the record of his field work. The court fixes a time for hearing thereon. The Director gives notice of such time and place of such hearing by registerd [*sic*] mail (ORS 539.130).

*STEP 10.* The proceeding continues as a suit in equity with right of appeal (ORS 539.150).

Exhibit D




Includes diversions for irrigation and power production.

RELATIVE YIELDS OF KLAMATH BASIN STREAM SYSTEM

## APPENDIX E

NOTICE TO WATER USERS
KLAMATH RIVER AND ITS TRIBUTARIES

To all persons, firms and corporations claiming a right to the beneficial use of the waters of Klamath River and its tributaries situated in Klamath, Lake and Jackson Counties, Oregon.

TO WHOM IT MAY CONCERN:

You, and each of you, are hereby notified that on September 1, 1976 the Water Resources Director of the State of Oregon will begin an investigation of the flow and use of the waters of Klamath River and its tributaries, pursuant to the provisions of ORS 539.020 (except Cherry Creek, Anna Creek, and those portions of Wood River, Sprague River and Swan Lake Basin outside the former Klamath Indian Reservation boundaries.

You are further notified that any of you who intend to claim rights to the beneficial use of waters of said stream system, such use having been initiated prior to February 24, 1909 or prior to the effective dates for vested rights as provided by law, for those lands within the boundary of the former Klamath Indian Reservation, and continued to the present time, are required to file with the Water Resources Department, Salem, Oregon, on or before October 1, 1976, a written notification of intention

to file a claim, as provided by ORS 539.030. Said notification to the Water Resources Department shall contain the name and mailing address of the claimant, the character of use and the location of the right to be claimed, the date when beneficial use of water was commenced, and whether the right is described in a permit or water right certificate issued by the Water Resources Director.

The intent of the Oregon Water Rights Act relative to this proceeding is that all beneficial uses of the waters of the stream system, which are commenced prior to February 24, 1909 or prior to the effective dates for vested rights as provided by law, for those lands within the boundary of the former Klamath Indian Reservation, and have been continued in use to the present time, MUST be declared and claimed in this proceeding by the present owners thereof. Any owner or claimant who fails to appear in this proceeding and assert and submit proof of his claim to such beneficial use of the water shall be barred and estopped from subsequently asserting any right theretofore acquired upon the stream system under consideration.

The owners of land benefited by a permit or water right certificate acquired after the enactment of the Water Code requiring such a filing are not required to enter this proceeding to maintain the use evidenced by the permit or certificate. However,

there must appear and file in this proceeding to become a party hereto in order to contest the claims of those asserting a right hereunder.

After the period for filing written notice to the Water Resources Department of intention to file a claim has expired, the Water Resources Director or his duly authorized assistant will make a field inspection and survey of the lands irrigated, and other uses, as set out in said notice of intention to file a claim. After such field inspection and survey has been completed, further notice will be given fixing a time and place where the Water Resources Director will receive claims and testimony as to the rights of all parties claiming appropriations from said Klamath River and its tributaries, as provided by law.

Dated at Salem, Oregon this 23rd day of December, 1975.

[Signature omitted in printing]

No. 83-1735

# In the Supreme Court of the United States

OCTOBER TERM, 1983

---

STATE OF OREGON, PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

---

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## QUESTION PRESENTED

Whether the court of appeals correctly concluded that the district court did not abuse its discretion by failing to dismiss a water rights adjudication in favor of a subsequently-initiated state administrative proceeding, where the federal adjudication is restricted to a declaration of the relative priorities of federally-derived water rights and where the state proceeding has not shown any tangible progress in the eight years since the motion to dismiss was filed.

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## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 37-95) is reported at 723 F.2d 1394. The opinion of the district court (Pet. App. 1-36) is reported at 478 F. Supp. 336.

### JURISDICTION

The judgment of the court of appeals was entered on November 15, 1983. A timely petition for rehearing was denied on January 24, 1984. The petition for a writ of certiorari was filed on April 23, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. In 1864, the Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians [1] entered into a treaty with the United States, by which the Indians ceded the bulk of their ancestral lands in return for a reservation in Oregon on the east side of the Cascade Range. 16 Stat. 707. That reservation encompassed most of the course of the Williamson River, a tributary of the Klamath River, which arises in Klamath County, Oregon, and ultimately flows southward where it empties into Upper Klamath Lake. Approximately halfway down its course, and above the "reef" at Kirk, Oregon,[2] the Williamson River fans out as it enters a valley known as Klamath Marsh, a site historically important to the Indians for hunting, fishing, trapping, and gathering. (Pet. App. 39-40.)

In the years following the establishment of the reservation, the Indians continued to exercise subsistence hunting, fishing and gathering rights as recognized by Article I of the 1864 Treaty. In addition, as contemplated by Article VI of the Treaty, certain lands within the reservation were allotted to individual Indians. Some of these allotted lands passed into non-Indian ownership.

2. In 1954, Congress passed the Klamath Termination Act, later amended, 25 U.S.C. 564 *et seq.*, "to provide for the termination of Federal supervision over the trust and restricted property of the Klamath

---

[1] For convenience, all of the 1864 Treaty Indians will be collectively referred to as the "Klamath Indians" or "Klamath Tribe."

[2] The Kirk "reef", over which the Williamson River flows, is a natural rock formation immediately downstream from Klamath Marsh.

Tribe * * * and of the individual members thereof [and] for the disposition of federally owned property acquired or withdrawn for the administration of the affairs of said Indians * * *." Section 14 of the Termination Act, 25 U.S.C. 564m, however, provided that the statute would not abrogate any water rights of the Tribe or its members and that state laws regarding the abandonment of water rights would not apply for 15 years following termination. Section 14 also stated that the Act would not abrogate any treaty-protected fishing rights or privileges. Finally, by subsequent amendments, Act of Aug. 23, 1958, Pub. L. No. 85-731, 72 Stat. 816 *et seq.*, Act of Sept. 9, 1959, Pub. L. No. 86-247, 73 Stat. 477 *et seq.*, the Termination Act provided that the Tribe's beneficial interest in portions of the lands comprising Klamath Marsh and the Indians' forest lands would be taken by the United States in return for monetary payment.

The termination process was carried out as prescribed by the Act. In 1961, the Secretary of the Interior published a proclamation in the Federal Register terminating federal supervision over the Tribe and its members (Pet. App. 94, n.26). The federally-owned lands in Klamath Marsh now comprise the Klamath Forest National Wildlife Refuge under the administration of the Department of the Interior. In addition, the bulk of the former reservation forest lands are now administered by the Department of Agriculture as part of the Winema National Forest. While federal supervision over the Tribe has terminated, the Indians' hunting and fishing rights, recognized by Article I of the 1864 Treaty, continue in force. *Kimball* v. *Callahan*, 590 F.2d 768 (9th Cir.), cert. denied, 444 U.S. 826 (1979); *Kimball* v. *Callahan*, 493 F.2d 564 (9th Cir.), cert. denied, 419 U.S. 1019 (1974).

3. On September 29, 1975, the United States commenced this action by filing a complaint naming as defendants all persons and entities "claiming any right to the use of water within the watershed of the upper Williamson River" above the Kirk "reef."[3] The complaint stated that all of the defendants were believed to claim interests in lands within the former Klamath Reservation and had acquired those interests directly, or through mesne conveyances, from the United States as trustee for the Tribe or from individual members of the Tribe to whom lands had been allotted. The government sought, among other things, a judgment declaring the relative rights of the defendants and the United States to utilize the surface and ground waters of the Upper Williamson River. The Klamath Tribe intervened on the side of the United States while the State of Oregon intervened as a defendant.

On December 23, 1975, the Water Resources Director of the State of Oregon signed[4] a notice stating that he would, on September 1, 1976, begin "an investigation of the flow and use of the waters of the Klamath River and its tributaries, pursuant to the provisions of ORS 539.020 * * *." (Pet. App. 115-117.) The notice expressly included water rights claimed with respect to lands within the former Klamath Reservation and directed all water rights claimants to file, by October 1, 1976, "a written noti-

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[3] Petitioners erroneously assert (Pet. 3) that the action was initiated under the McCarran Amendment, 43 U.S.C. 666. In fact, the government's complaint alleged district court jurisdiction under 28 U.S.C. 1345.

[4] Although the notice was dated December 23, 1975 (Pet. App. 117), it was apparently not published until January 15, 1976 (see Pet. 8).

fication of intention to file a claim, as provided by ORS 539.030." (*Ibid.*).

Thereafter, beginning on May 6, 1976, the State and other defendants, relying upon *Colorado River Water Conservancy District* v. *United States*, 424 U.S. 800 (1976), moved to dismiss this suit in favor of the subsequently-initiated state adjudicatory proceeding. After a hearing, the district court implicitly denied the motion when it entered a pretrial order governing further proceedings in the case. Among other things, the pretrial order recited that the State of Oregon was being made a party solely in its proprietary capacity as an owner of lands within the litigation area and that the judgment would not bind state officials as to decisions to be made in their official capacities. It was also stated that the judgment would not adjudicate the rights of downstream claimants or other nonparties. Finally, the order provided that, following entry of a declaratory decree, the State "will administer the adjudication, quantification, enforcement, and filing of water rights in accordance with its regular, normal, and on-going process and authority under applicable statutes, and consistent with the decree entered herein."

On September 27, 1979, the district court entered an opinion declaring the rights of the parties (Pet. App. 1-36). First, the court held that Article I of the 1864 Treaty confirmed an implied right to as much water as is necessary to fulfill the hunting, fishing and gathering rights recognized by that provision, with a time immemorial priority date, and that all of those rights continue to exist (Pet. App. 19-25, 34). Second, the court ruled that Articles II-V of the Treaty, which encourage the adoption of agriculture and contemplate individual allotments, impliedly create an additional tribal water right and

that when parcels were allotted to individual Indians, the allottees and their Indian successors acquired a portion of that water right, with an 1864 priority date (Pet. App. 22-23, 34). The court further held that, should a conflict arise, the Article I water rights prevail over the agricultural treaty water rights (Pet. App. 23). As to the water rights of non-Indian purchasers of allotted lands, the district court declared that a non-Indian successor to an Indian allottee acquires an appurtenant water right to water for the actual acreage under irrigation at the time he acquires title, plus such additional lands as he may with reasonable diligence place under cultivation, all with an 1864 priority date (Pet. App. 28-32, 34-35).[5]

4. The court of appeals affirmed (Pet. App. 37-95). At the outset of its discussion (Pet. App. 46-56), the court considered whether this Court's intervening decision in *Arizona* v. *San Carlos Apache Tribe*, No. 81-2147 (July 1, 1983), coupled with *Colorado River Water Conservation District* v. *United States*, *supra*, mandate dismissal of the federal suit in favor of the state proceedings. The court of appeals concluded that they do not.

First, the Ninth Circuit observed (Pet. App. 47-49) that in both *San Carlos Apache Tribe* and *Colo-*

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[5] The district court declined to rule upon the United States' claims regarding its water rights for its wildlife refuge and national forest lands within the boundaries of the former Klamath Reservation (Pet. App. 25-26). The court also declined to reach certain issues asserted by the State and individual defendants (Pet. App. 33-35). As to national forest lands outside of the former reservation, the court held that the government's reserved rights were limited to such waters as were unappropriated when the forest lands were reserved and which are essential for timber production and conservation of water flow (Pet. App. 26-28, 34).

*rado River* this Court expressly stated that the McCarran Amendment did not deprive the federal district courts of jurisdiction to adjudicate the water rights of the United States. Second, relying upon *Will* v. *Calvert Fire Insurance Co.*, 437 U.S. 655, 664 (1978), the court of appeals found (Pet. App. 48-49) that its review of the district court's ruling on the dismissal motion was to be governed by the "abuse of discretion" standard.

Turning next to a detailed consideration of the district court's ruling in light of *San Carlos Apache Tribe* and *Colorado River*, the court held that "on the facts of this case, the district court did not abuse its discretion by proceeding to decide, rather than dismiss, the federal law questions presented to it by the United States' suit." (Pet. App. 50.) The court first observed that the notice initiating the state administrative proceeding was not issued until after the federal suit had been commenced (Pet. App. 51-52). The court then noted (Pet. App. 52) that even by the date of its opinion, more than seven years after publication of the State's notice, the state determination had not proceeded beyond the initial administrative investigation and that the information-gathering stage was still in progress. It was stressed (Pet. App. 53) that the district court, after consideration of voluminous briefs and an extensive record, had carefully tailored its exercise of jurisdiction to decide only the priority among water rights created by federal law and had left all other matters, including quantification of the federally-derived rights, to be determined by the state forum. Neither the policies of the McCarran Amendment nor the interests of wise judicial administration, the court held (Pet. App. 53-54), would be served by now set-

ting aside the district court's decision and directing the parties to begin anew in state proceedings.

In all the circumstances, the court of appeals concluded that the district court had not abused its discretion by declining to dismiss the case. The court of appeals then affirmed the district court on all of the substantive issues.[6]

## ARGUMENT

As its opinion demonstrates, the court of appeals faithfully adhered to the standards established by this Court in *San Carlos Apache Tribe* and *Colorado River* when it determined that, under the particular facts of this case, the district court was not required to grant the motion to dismiss. The decision of the court of appeals is correct and presents no issue of general importance warranting review by this Court. Accordingly, the petition for a writ of certiorari should be denied.

In *San Carlos Apache Tribe*, this Court held that the McCarran Amendment usually requires that a federal water suit be dismissed or stayed in favor of prior or concurrent and adequate state adjudications. But that is not the inevitable result (slip op. 22). As the court of appeals correctly observed, the particular circumstances of this case support retention of federal district court jurisdiction under the standards announced by this Court in *San Carlos*.

First, in *San Carlos Apache Tribe* and *Colorado River*, this Court found it significant that the States

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[6] The court also ruled (Pet. App. 77-81) that the Indians' hunting and fishing treaty water rights could not be converted into government reserved water rights for the national wildlife refuge and the national forest with the 1864 priority date. The district court had declined to reach this issue, see page 6, note 5, *supra*, and no party raised the issue on appeal.

of Montana, Arizona, and Colorado had demonstrated, through the enactment of new legislation or the maintenance of prior comprehensive judicial proceedings, a firm commitment to proceed with a timely resolution of water rights controversies throughout those states. *San Carlos Apache Tribe*, slip op. 7-8, 10-11; *Colorado River*, 424 U.S. at 804-805, 819-820. Here, in contrast, Oregon has not yet made any commitment similar to that of Arizona, Colorado or Montana. Rather, the State Water Resources Director merely served notice that he was commencing an "investigation" of the Klamath River and its tributaries pursuant to Or. Rev. Stat. § 539.020 (1981). Now, more than eight years later, that investigation has not been completed. Even when it is completed, there will still be no assurance that the Director will follow through and make a comprehensive adjudication. Oregon law does not require the Director to make a final determination; rather, Or. Rev. Stat. § 539.020 provides that he shall make a determination *if* "upon investigation he finds the facts and conditions justify it." And only after a conclusion of the "investigation" and a decision by the Director to go forward are the parties required actually to file their statement of claims and does the case proceed to an administrative hearing which may ultimately culminate in an administrative decision subject to judicial review.[7] See Or. Rev. Stat. § 539.030.539.130.

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[7] It is questionable whether the state proceeding has yet matured into an adjudication within the meaning of the McCarran Amendment. The McCarran Amendment, like this Court's opinions in *San Carlos Apache Tribe* and *Colorado River*, speaks in terms of "suit[s]" in state "court[s]." Not only have no judicial proceedings yet been commenced here, but even the actual administrative adjudication has not yet begun. As described above, at this point the State Director

Second, in *San Carlos Apache Tribe*, this Court sustained the dismissal of the federal actions because, in part, of a concern that "the existence of such concurrent proceedings creates the serious potential for spawning an unseemly and destructive race to see which forum can resolve the same issue first—a race contrary to the entire spirit of the McCarran Amendment and prejudicial, to say the least, to the possibility of reasoned decisionmaking by either forum" (slip op. 20). Here, however, given the nature of the state administrative proceedings as just described, the potential for such a destructive race was virtually nonexistent. The federal courts below clearly did not race to judgment but, instead, thoroughly considered the issues upon extensive briefings and entered carefully reasoned decisions.[8] The Director, in turn, as already noted, has proceeded in a far less expeditious manner.[9] Under these circumstances, fears of a "destructive race" in this particular case have no basis in fact.

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has only announced that he is conducting an investigation which may (or may not) eventually lead to an administrative adjudication, followed by possible judicial confirmation.

[8] Petitioner does not seek review of any of the court of appeals' substantive rulings.

[9] Although the McCarran Amendment, which gave the consent of the United States to be sued in state courts for an adjudication of its water rights, was enacted in 1952, the Director did not issue his notice until after this action was commenced in federal court in 1975. Petitioner's assertion (Pet. 6) that the Klamath Termination Act barred state adjudication of the federally-based rights at issue here until 1976 is simply incorrect. The Termination Act contains no provision barring a state adjudication pursuant to the McCarran Amendment and *San Carlos Apache Tribe* and *Colorado River* establish that Indian water rights may be adjudicated in state court under that statute.

Finally, as the court of appeals aptly noted (Pet. App. 53-54), "neither the policies of the McCarran Amendment, nor the interest[s] of wise judicial administration would be served by a decision * * * reversing and vacating the district court's judgment without reaching the merits." Here, the federal district court carefully confined itself to declaring the relative priorities of federally-derived water rights in a novel and virtually unique setting—that of a former federal Indian reservation—and left all other matters, including the actual quantification of the federally-derived rights, to be resolved in an appropriate state forum. At this late date, it would be extremely wasteful to vacate the limited ruling of the federal court and require relitigation of the issue, at some indeterminate future time, before a state tribunal. This Court has now reaffirmed the jurisdictional rules without ambiguity in *San Carlos Apache Tribe*. Even if (contrary to our primary submission) those rules would have justified abstention by the district court in the present case a decade ago, that does not warrant this Court's intervention today. In this instance, the law is well served by leaving well enough alone.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 83-1735

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

STATE OF OREGON
Petitioner,
v.

UNITED STATES OF AMERICA,
KLAMATH INDIAN TRIBE and
BEN ADAIR, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

# RESPONDENT TRIBE'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

1. In a water rights adjudication wholly within the former Klamath Indian Reservation did the federal district court abuse its discretion by declaring the existence and priority of water rights based on federal law and deferring quantification of those rights to a subsequent state proceeding?

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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# RESPONDENT TRIBE'S BRIEF IN OPPOSITION

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## STATEMENT OF THE CASE

The United States commenced this suit in federal district court on September 29, 1975, by filing a complaint against certain named defendants plus "all other persons claiming any right to the use of water

within the watershed of the Upper Williamson River as defined herein." (CR 1 at 3.) All of the defendants were believed to claim interests in lands within the former Klamath Indian Reservation and had acquired those interests directly, or from the United States as trustee for the Klamath Tribe or as trustee for individual members of the Tribe to whom lands had been allotted (CR 1 at 7). The United States sought a declaratory judgment to determine the relative rights of the defendants and the United States to utilize the surface and ground waters of the Williamson River watershed above the Kirk "reef", a natural rock formation downstream from Klamath Marsh. The complaint also sought an injunction barring use of

water in derogation of the rights of the United States (Id. at 8-9). The Klamath Tribe was allowed to intervene in the case as a plaintiff (CR 283) under 28 U.S.C. § 1362. The state of Oregon intervened as a defendant.

Certain defendants, relying upon Colorado River Water Cons. Dist. v. United States, (Akin) 424 U.S. 800 (1976), moved to dismiss in favor of a subsequent state administrative proceeding. On September 13, 1976, after extensive briefing, the district court held a lengthy hearing on the motions (CR 283). At the conclusion of the hearings, the court indicated that it would deny the motions, although no formal ruling was entered at that time (CR 283 at 62). Rather, the court directed the parties to

jointly prepare a pretrial order which, when entered on November 2, 1977, stated the court's decision to retain jurisdiction (CR 388-389).

The order concluded that, following entry of a declaratory decree, the State "will administer the adjudication, quantification, enforcement, and filing of water rights in accordance with its regular, normal and on-going process and authority under applicable statutes, and consistent with the decree entered herein." (Id. at 26-27.)

On September 27, 1979, the district court issued its opinion declaring the rights of the parties (CR 650). First, the court held that Article I of the 1864 Treaty, which recognized that the Indians could

continue to exercise their traditional hunting, fishing, trapping and gathering activities on the Klamath Reservation, confirmed an implied right to as much water as needed to sustain these rights, with a priority date of time immemorial (Pet. App. 20-22, 34). As the Termination Act preserved the Tribe's water rights, the Indians are entitled to as much water as they need to protect their hunting and fishing rights (Pet. App. 22). Second, the court ruled that Articles II to V of the Treaty, which encouraged adoption of agriculture and provided for allotments to individual members, impliedly reserved an agricultural water right and that when parcels were allotted to individual Indians, the allottees and their

Indian successors acquired the right to use a portion of the tribal water essential for cultivation, with an 1864 priority date (Pet. App. 22, 23, 34). The court further held, that should a conflict arise, the Article I water rights for hunting and fishing purposes prevail over the agricultural treaty water rights (Pet. App. 23). As to the water rights of non-Indian purchasers of allotted lands, the court declared that a non-Indian successor to an Indian allottee acquires an appurtenant water right to water for the actual acreage under irrigation at the time he acquires title plus water for such additional lands as he may with reasonable diligence place under cultivation, all

with an 1864 priority date (Pet. App. 28-32, 35).

The court declined to rule upon the United States' claims regarding its water rights for wildlife refuge and forest lands within the boundaries of the former Klamath Reservation. The court stated that it was unnecessary to reach those questions, as the Indians' rights to streamflows to protect their hunting and fishing rights would be adequate to protect the United States' rights (Pet. App. 20). As to national forest lands "outside of the former reservation" the court held that the United States' reserved rights were limited to such waters as were unappropriated when the forest lands were reserved and which are essential for timber production

and conservation of water flow (Pet. App. 26-28).1/

On appeal, the Ninth Circuit Court of Appeals, affirmed the district court's rulings on the merits in most respects and specifically affirmed the court's decision to reach the merits. The state's petition here challenges only the district court's discretionary decision to exert jurisdiction to a limited extent.

REASONS FOR DENYING THE WRIT

A. The District Court Did Not Abuse Its Discretion.

The state's petition argues that this Court should grant certiorari

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1/While the district court opinion characterized some of the land as adjacent national forest land, that land apparently had been wrongfully excluded from the Klamath Reservation. See Klamath Ind. Tribe v. Or. Dept. of Fish and Wildlife, 729 F.2d 609 (9th Cir. 1984).

because the federal district court decision (upheld by the Ninth Circuit Court of Appeals) to proceed to the merits of the federal law issues in this action rather than defer to subsequent state administrative proceedings was so out of line with this Court's pronouncements on the subject that this Court should exercise superintending control. But the decision of the district court is actually in harmony with this Court's pronouncements in Colorado River Water Cons. Dist. v. United States ("Akin"), 424 U.S. 800 (1976) and Arizona v. San Carlos Apache Tribe of Arizona(San Carlos), ___ U.S. ___, 77 L. Ed. 2d 837 (1983) so there is no reason for this Court to grant review.

Petitioner has not argued to this Court that the federal courts'

decisions on the merits are erroneous. Its argument is rather that this Court should review for abuse of discretion, a decision to exercise jurisdiction; that a judgment rendered by a federal court and affirmed by the Ninth Circuit Court of Appeals should be undone; that all the effort expended by the parties and the federal courts should be nullified; and that matters should be turned over to a state administrative proceeding which in over eight years has not proceeded beyond the investigatory stage, and which may never proceed beyond the investigative stage. Nothing in Akin or San Carlos remotely requires such a waste of judicial resources.

This Court in Akin viewed the question to be the proper exercise of

jurisdiction when state and federal courts have concurrent jurisdiction, governed by considerations of "wise judicial administration." 424 U.S. at 817. The Court emphasized "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." Id. "Given this obligation, the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than circumstances appropriate for abstention." Id. at 817-18. The decision to defer to state proceedings or not is committed to the sound discretion of the district court. Will v. Calvert Fire Ins. Co., 437 U.S. 655, 664 (1978),(Pet. App. 48-49).

The federal court's obligation to exercise its jurisdiction was, on the record in Akin, found to conflict with several competing considerations: the policy of the McCarran Amendment to avoid piecemeal or duplicative litigation, the absence of any proceedings in the District Court beyond the motion to dismiss, the extensive involvement of state water rights, the extensive involvement of the Government in other divisions of the Colorado Water Court, and the distance between the federal court's headquarters in Denver and the State Water Court at Durango. Id. at 819-20. The Court warned that the case might be different if any of these factors were altered. Id. at 820. The policy of avoiding

duplicative litigation has been recognized as the most important factor. Id. at 819. The other factors have been characterized as secondary. Id.; Will v. Calvert Fire Ins. Co., 437 U.S. 655, 673 (1978) (dissenting opinion).

The present case is not governed by the result in Akin because the factors emphasized there are each presented very differently on this record than in Akin. We shall discuss each of them.

a. Akin relied primarily on the policy of the McCarran amendment to avoid piecemeal or duplicative proceedings. As expressed in this Court's opinion in San Carlos, supra, the concern was that federal proceedings:

> . . are likely to be duplicative and wasteful, generating additional litigation through permitting inconsistent dispositions of property. Colorado River, 424 U.S., at 819. Moreover, since a judgment by either court would ordinarily be res judicata in the other, the existence of such concurrent proceedings creates the serious potential for spawning an unseemly and destructive race to see which forum can resolve the same issues first -- a race contrary to the entire spirit of the McCarran Amendment and prejudicial, to say the least, to the possibility of reasoned decision-making by either forum.

Even before judgment was entered, there was little likelihood of duplicative litigation or racing to the courthouse here. This is so

because of the nature of the subsequent Oregon proceeding which began with an administrative investigation to ascertain whether a determination of rights and ultimately a resort to state court is even necessary. 539.020 ORS.

There was no race here to see who could litigate the legal question of the existence and nature of federal rights first. In fact, nothing has yet happened in the state administrative proceeding on the merits of any issue. And as pointed out, the director, under Oregon law, could decide not to proceed to the merits.

The state attempts to contrast the "comprehensive" nature of the state proceeding with the limited

nature of the federal proceeding. This is said to create a problem because those in any state proceeding will not be bound by the federal proceeding, and duplication will result. Yet Petitioner admits that the state "proceeding" does not include areas previously adjudicated (Pet. Brief at p. 5 and fn. 3). It is not explained why the federal decree presents any more of a problem than those areas previously adjudicated under the state procedure and which involve parties not a part of the present state proceeding.

Also of importance is the fact that those rights decreed to the Tribe are essentially nonconsumptive (Pet. App. 78), and downstream users can only benefit from the existence of such tribal rights. The chances for

disagreement between upper and lower basin users is thus much less than is normally the case in a typical state proceeding. Thus, the federal decree in this case may simply be incorporated into the state proceeding with no duplication of effort.

All of the concerns this Court expressed in San Carlos are moot in this case because the federal court has rendered a judgment on many complex federal issues, and none of the practical or theoretical concerns ever materialized.[2/]

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[2/]There is an "interest in preserving a fully litigated judgment (that) should be overborne only by rather greater opposing considerations than would be required at an earlier stage when the plaintiffs' only concern was for a federal rather than a state forum." Provident Bank & Trust Co. v. Patterson, 390 U.S. 102, 112 (1968).

It is Petitioner's path that would result in duplication(Pet App. 50). It asks this Court to allow it to relitigate the federal issues before the Director and the state's courts. It requests this even though it does not challenge the lower court rulings on the merits.

b. Another of the Akin factors was the lack of any District Court proceedings beyond hearing the motion to dismiss. In the instant case the District Court has conducted several years of proceedings on the merits leading to resolution of numerous complex federal issues (none of which are here challenged on their merits). Admittedly, the motion to dismiss antedated these proceedings; when they were filed there had been few

proceedings below. But the state proceedings are only in an investigatory stage and under O.R.S. 539.020, once the investigatory stage is completed, the Director then decides whether to proceed with a determination of rights.

The Ninth Circuit opinion accurately describes the nature and status of the state process.

> Some months after the United States filed its suit in federal court, however, the Oregon State Water Resources Director issued a notice announcing that on Sept. 1, 1976, he would "begin an investigation of the flow and use of waters of the Klamath River and its tributaries ..." Under the Oregon scheme for adjudicating water rights, such a notice of investigation is one of the prerequisites to a state court

determination of water rights. In addition, the Water Resources Director, after investigation, must decide that the "facts and conditions justify" making a determination of water rights. See Or. Rev. Stat. 539.020 (1981). At the time the district court ruled on defendants' motion to dismiss the federal suit, none of the preliminary steps in the Oregon adjudication had been completed.

Of equal or greater importance to our decision in this case, however, is the fact that even at this time, some seven years after the Oregon Water Resources Director issued his notice of investigation, the state determination of water rights in the Klamath Basin has not proceeded beyond administrative investigation. Indeed, the information-gathering stage of the procedure is not yet complete.

Thus, the point has not yet been reached when the decision has been made that there will be a determination of water rights. Under these circumstances, deference to the state proceeding is not required by Akin or San Carlos.

c. A third factor involved in Akin was the preponderance of state law issues. This Court in San Carlos acknowledged that where rights primarily depend in federal law, that is an important factor to weigh. ____ U.S. ____, 77 L.Ed. 2d at 855. In Moses H. Cone Hospital v. Mercury Const., 460 U.S. ___, 74 L.Ed. 2d 765 (1983), the Court noted that the state - versus - federal law factor was of ambiguous relevance in Akin, because of the McCarran Amendment and because,

while the rights of the tribes and the federal government were based on federal law, the bulk of the litigation would necessarily revolve around the state law rights of the nonfederal parties. 74 L.Ed. 2d at 784, 785. Most of the rights at issue in San Carlos were also based on state law. Here, the only rights determined were those based on federal law (Pet.App. 54-55). Even the rights of non-Indian successors to allottees depend on federal law. Generally, the presence of federal law issues must always be a major consideration weighing against surrender of federal court jurisdiction to state courts. Moses H. Cone, supra, 74 L.Ed. 2d at 786. State interests here are adequately accommodated because the

court ordered quantification in state proceedings.

d. Another factor in Akin was that Colorado had, by enactment of a recent statute, embarked on an attempt to adjudicate comprehensively the claims of all water users throughout the State. When Akin was filed the state effort was well under way and the United States was already participating in water rights adjudications in three of the seven water districts in the State. And, although the United States had not yet been brought into the suit, a water adjudication involving the same district as was involved in Akin was already underway in state court when the federal government filed its complaint in the federal court. Akin, supra, 424 U.S. at 806. Here, by

contrast, Oregon makes no attempt to claim that it was, on its own initiative, moving forward in such a comprehensive manner. Compare also Montana's comprehensive scheme in San Carlos 77 L.Ed. 2d at 848. The state here began an administrative investigation after the federal government filed its complaint and has in fact moved forward at a snail's pace.3/

e. Akin mentioned the 300 mile distance between Denver and Durango. Petitioner does not mention this because it was not a serious factor here. To the extent that this factor

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3/It is difficult to comprehend that the state could not as it argues, (Pet. 6) proceed before 1976 because its law of abandonment did not apply to the Tribe's rights then. Abandonment has nothing to do with an initial determination of rights.

was more than a make weight in Akin,[4/] it must be taken to focus on the detailed proceedings needed to quantify water rights. The declaratory proceedings actually conducted in the District Court here did not involve any inefficiencies of location. Quantification was deferred to the Director (who, in any case, is in Salem, not Klamath Falls).

There are two additional factors present in this case which justify the district court's actions below. First, this Court in San Carlos noted that the fact that tribes are

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4/ It may be doubted whether the Court meant this factor to be significant. As the dissent pointed out, Durango is a statutory place of hearing for the Colorado federal court. 424 U.S. at 823 n.6. Similarly, Klamath Falls is a place of hearing for the Oregon court. 28 U.S.C. § 117.

plaintiffs may make a difference. 77 L.Ed. 2d at 849. As the Ninth circuit Court of Appeals noted in this case, "Once the Tribe intervened, in light of the district court's limited exercise of jurisdiction, the case presented, for all practical purposes, a suit to adjudicate Indian water rights on behalf of an Indian Tribe." (Pet. App. at 55.) This factor argues strongly in favor of federal jurisdiction.

Finally, given the investigative nature of the state proceeding and the uncertainty it will ever reach the state court, this may not be the type of proceeding to which a federal court may be required to defer. See Moses H. Cone Hospital v. Mercury Const. Co., 460 U.S. ____, 74 L.Ed. 2d 765, at 771-2 (1983) (doubts as to

jurisdiction sufficient reason to deny deference to state proceedings).

B. The Unique Facts of This Case Are Unlikely to Recur.

This case presents facts unlikely to recur. All parties, including non-Indian land owners, claimed federal water rights. The issues were wholly governed by federal law and the area involved is entirely comprised of a former Indian reservation. The bulk of the water rights declared is nonconsumptive. Given the unique circumstances of the federal district court's exercise of discretion, review by this Court would not serve any broad interest.

## Conclusion

For the reasons stated, the writ should be denied.

Respectfully submitted,

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No. 83-1738

# In the Supreme Court of the United States

OCTOBER TERM, 1983

BEN ADAIR, et.al, and
STATE OF OREGON,

Petitioners,

v.

UNITED STATES OF AMERICA and
KLAMATH INDIAN TRIBE,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## Brief of the States of Montana, Arizona, California, Idaho, Nevada, North Dakota, Texas, South Dakota, and Utah, in Support of Petition for Writ of Certiorari, Amici Curiae

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## ISSUE

Although the decision below dealt with other issues, this brief is limited to the following question:

Whether under the doctrine of "wise judicial administration" enunciated by this Court in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), the district court below erred in assuming jurisdiction to decide matters pertaining to a general adjudication of water rights pending in state adjudication proceedings.

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## INTEREST OF AMICI

The western states named herein as *amici* have established intricate systems to manage and allocate scarce water resources in the arid West. By and large these systems are based upon principles of prior appropriation which protect existing economies based upon established uses. These legal systems are similar to the one in place in Oregon. The stability afforded by western water law has, in large measure, enabled the West to become socially inhabitable and economically productive.

An essential element of virtually every western state system of water allocation is the comprehensive "general water rights adjudication." The general adjudication provides a method whereby water users or state officials can initiate proceedings to obtain a determination of all relative water rights from a particular water source. The only way to assure the effectiveness of the general adjudication is to join all potential claimants, require that each claimant assert all potential claims, and bind all parties by the result. The disregard of the state adjudication proceeding by the district court and the court of appeals vitiates the purpose and effect of the state proceeding and thereby jeopardizes the ability of the state to effectively manage its water resources.

So successful has the West been in managing its water resources that the federal government has continually deferred to state water law. In 1866, by passage of the Mining Act, 14 Stat. 262 (1866), 43 U.S.C. § 661

(1970), Congress stated its intention in this regard by approving past and future appropriations of water on public lands which had been made pursuant to local procedures. Congress acted in similar fashion when it enacted the Desert Land Act of 1877, 19 Stat. 377 (1877), as amended 43 U.S.C. § 383 (1970). This Court recognized that statute as having severed the land and water estates in the western public domain, directing that rights to water be established pursuant to state law, independently of rights to land which could be established under federal law. *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935).

More recently, in *California v. United States*, 438 U.S. 645 (1978), and *United States v. New Mexico*, 438 U.S. 696 (1978), this Court considered carefully "the history of congressional intent in the field of federal-state jurisdiction with respect to allocation of water." *New Mexico*, 438 U.S. at 701-702. The Court held in favor of the state jurisdiction in both instances. Just last term this Court decided three landmark cases recognizing the importance and viability of state systems of water law and the rights created thereunder. *See Arizona v. California*, ___ U.S. ___, 103 S.Ct. 1382 (1983); *Arizona v. San Carlos Apache Tribe*, ___ U.S. ___, 103 S.Ct. 3201 (1983); *Nevada v. United States*, ___ U.S. ___, 103 S.Ct. 2906 (1983).

Particularly important in the instant case is the 1952 congressional enactment of the so-called "McCarran

Amendment," 43 U.S.C.A. § 666 (1964), which provides in part:

> "(a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under state law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit."

The intent of Congress in enacting this statute was to ensure that federally held water rights in the West be subject to determination in state general adjudication proceedings and thereby integrated into state systems of water law. Congress thus intended to promote comprehensive and unitary management of western water rights and avoid piecemeal consideration.

Despite the clear language of the McCarran Amendment the United States continually has sought to avoid it. Initially, the United States sought to exclude its reserved rights from state adjudication proceedings. This Court, in the *United States v. District Court in and for the County of Eagle*, 401 U.S. 520 (1971) and *United States v. District Court in and for Water Division No. 5*, 401 U.S. 527 (1971), held that the McCarran Amendment subjected federal reserved rights to general adjudication of water rights in state proceedings, finding that reserved rights were included in those rights where the United States was "otherwise" the owner. (*See* quotation of statute above).

The *Eagle County* decision spoke of Indian and non-Indian reserved water rights without any suggestion that there was a distinction between them for purposes of the McCarran Amendment. Notwithstanding, after *Eagle County* the United States insisted that Indian reserved water rights were not covered under the purview of the McCarran Amendment. In *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) this Court held that the McCarran Amendment provides state courts with jurisdiction to adjudicate Indian reserved water rights. This Court further held that, in light of the clear federal policies underlying the McCarran Amendment, a water rights suit brought by the United States in federal court should be dismissed in favor of a concurrent comprehensive state adjudication proceeding addressing the same issues.

Even after the *Colorado River* decision, the United States and Indian tribes asserted that the *Colorado River* rule should not obtain where Indian tribes themselves initiate federal court proceedings to determine their water rights or where those rights are located in so-called "disclaimer" states, *Arizona v. San Carlos Apache Tribe*, ___ U.S. ___, 103 S.Ct. 3201 (1983). Again a case involving the meaning of the McCarran Amendment had to be decided by this Court and once again, this Court emphasized that the McCarran Amendment subjects Indian reserved water rights to determination in state adjudication proceedings, regardless of other apparent limitations in

federal law or policy, and that concurrent federal proceedings should be dismissed in favor of state adjudication proceedings.

Despite these repeated directions from this Court, the United States and the Indian tribe, in the case below, have attempted to carve out another exception from the ruling laid down in *Colorado River*; namely, that states have jurisdiction to determine Indian water rights in state adjudication proceedings and that federal proceedings should be dismissed if they address the same issues involved in pending state adjudication proceedings. In ruling in favor of the United States and the Indian tribe on this matter, the district court attempted to distinguish *Colorado River* stating "the factual basis of the *Colorado River* case is not present here because of the limited jurisdiction of the state and because of other differences." *See* Slip Opinion at 50, footnote 6). Readers of the opinion are left to wonder in what respect Oregon's jurisdiction is limited. The "other differences" referred to apparently are what the appeals court characterized as the nascent nature of the state adjudication proceedings, which had "not moved forward" during the circuit court's deliberations in the case, and which were, according to the court, "stayed during pendency of the federal suit." (Slip Opinion at 15.) These statements demonstrate two things. First, that both the Ninth Circuit and the district court apparently lacked understanding of the complexity of the general adjudication process, and second that the courts,

in reaching their decisions, relied upon incorrect information regarding the status of the state adjudication proceedings. It is clear that the state proceedings did move forward while the federal suit was pending. Oregon expended substantial sums in this regard, completing surveys and other field work essential to the adjudication process. *See* Affidavit of Chris Wheeler, Deputy Director of the Oregon Department of Water Resources (Appended to Appellant's Petition for Rehearing before the Ninth Circuit Court of Appeals, November 30, 1983.)

The *amici* states are concerned by the Ninth Circuit's decision because of its departure from the precedent set by the decisions of this Court. Further, the *amici* submit that the decision below encourages the piecemeal, duplicative, and wasteful litigation the McCarran Amendment is designed to avoid. The decision stands for the "generation of additional litigation through permitting inconsistent dispositions of property." *San Carlos*, 103 S.Ct. at 3206 (quoting *Colorado River*, 424 U.S. at 819), which this Court has so carefully sought to eradicate. The decision runs contrary to congressional policy, as evidenced by the McCarran Amendment, of facilitating the general adjudication process and thereby bringing finality and certainty to western water rights. As a result, the *amici* urge this Court to grant Oregon's petition for writ of certiorari to review the decision below of the Ninth Circuit Court of Appeals.

## REASONS FOR GRANTING THE WRIT

**The decision below conflicts with the decisions of this Court and is adverse to the interest of sound public policy.**

**A. The decision below conflicts with the decisions of this Court.**

The McCarran Amendment, 43 U.S.C.A. § 666 (1964), was enacted in 1952 to make possible joinder of the United States in comprehensive state water right adjudication proceedings. As previously noted, the historical position of the United States has been to resist the application of the statute to federal reserved rights, especially to Indian reserved water rights.

Responding to this position, the Court in *United States v. District Court in and for the County of Eagle*, 401 U.S. 520 (1971), and *United States v. District Court in and for Water Division No. 5*, 401 U.S. 527 (1971) examined the provisions of the McCarran Amendment, whereby "consent is given to join the United States as a defendant in any suit (1) for the adjudication . . . or (2) administration of [water] rights, where it appears the United States is the owner . . . by appropriation under state law, by purchase, by exchange or otherwise." The Court concluded that the statute subjected federal reserved rights to general adjudication in state proceedings for the determination of water rights. Specifically, this Court held that reserved water rights were included in those rights where

the United States was "otherwise" the owner, *Eagle County*, 401 U.S. at 524.

After *Eagle County* was decided, the United States and various Indian tribes continued to argue that the term "federal reserved rights" did not necessarily include Indian reserved rights. In *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), this Court responded by stating that "not only the amendment's language, but also its underlying policy, dictate a construction including Indian rights in its provisions." *Colorado River*, 424 U.S. at 810. This Court stated further:

> "Mere subjection of Indian rights to legal challenge in state court, . . . would no more imperil those rights than would a suit brought by the Government in district court for their declaration, a suit which, absent the consent of the Amendment, would eventually be necessitated to resolve conflicting claims to this scarce resource."

*Colorado River*, 424 U.S. at 812. In considering the existence of concurrent federal proceedings this Court went on to hold that, while the case fell within none of the formally established categories of the "abstention" doctrine, principles of "wise judicial administration" required that the concurrent federal litigation be dismissed in favor of state adjudication proceedings addressing the same issues. This Court concluded that "a number of factors clearly counsel against concurrent federal proceedings," *Colorado River*, 424 U.S. at 819, and then defined the factors as follows:

> "The most important of these is the McCarran Amendment itself. The clear federal policy evinced

> by that legislation is the avoidance of piecemeal adjudication of water rights in a river system. . . . [W]e have recognized that actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings. *See Pacific Live Stock Co. v. Oregon Water Bd.*, 241 U.S. 440 (1916).
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> ". . . .
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> "Beyond the congressional policy expressed by the McCarran Amendment and consistent with furtherance of that policy, we also find significant (a) the apparent absence of any proceedings in the District Court, other than the filing of the complaint, prior to the motions to dismiss, (b) the extensive involvement of state water rights occasioned by this suit naming 1,000 defendants, (c) the 300 miles distance between the District Court in Denver and the court in Division 7, and (d) the existing participation by the Government in Division 4, 5, and 6 proceedings [footnote omitted]."

*Colorado River*, 424 U.S. at 819, 820.

After this Court's decision in *Colorado River*, federal and Indian attorneys sought to distinguish the case and its holding from similar situations. *Arizona v. San Carlos Apache Tribe*, ___ U.S. ___, 103 S.Ct. 3201 (1983), provided this Court another opportunity to emphasize that:

> "[T]he most important consideration in *Colorado River*, and *the most important consideration in any federal water suit concurrent to a comprehensive state proceeding*, must be the 'policy underlying the McCarran Amendment,' [citations omitted], and, despite the strong arguments raised by the respondents, we cannot conclude that water right suits brought by Indians and seeking adjudication only of Indian rights should be excepted from the application of that policy or from the general principles set out in *Colorado River*."

*San Carlos*, 103 S.Ct. at 3215 (emphasis added).

The results of this Court's decisions can thus be summarized as follows. First, the McCarran Amendment subjects Indian reserved water rights to adjudication in state adjudication proceedings. Second, concurrent federal litigation aimed at determining issues which are to be decided in a state adjudication proceeding should generally be dismissed under the doctrine of wise judicial administration. Third, the most important factor when considering such dismissal is the underlying policy of the McCarran Amendment, which is to avoid duplicative and wasteful litigation. Fourth, other factors to be taken into account when considering such dismissal are: (a) the status of the federal proceedings when a motion to dismiss them is made, (b) the involvement of state water rights occasioned by the state proceedings, (c) convenience of forums, and (d) participation by the federal government in other water right proceedings in the state.

In considering the application of the *Colorado River* principles to the present case, the following facts are pertinent. First, the State of Oregon has jurisdiction to adjudicate Indian reserved water rights in its general adjudication proceedings (for a discussion of the comprehensive nature of these proceedings, *see Pacific Live Stock Co. v. Oregon Water Bd.*, 241 U.S. 440, 448, 451 (1916)). Second, the federal litigation below was aimed at adjudication of a small portion of a river system completely included within a larger area covered by the state proceeding. The issues to be determined in the federal proceedings, therefore, would be decided in the state pro-

ceedings. Third, the federal proceeding was not binding on any downstream water users not participating in the suit (Pretrial Order, paragraph 2, p. 3.). These parties, therefore, could relitigate the same questions decided by the federal court. This violates the primary policy underlying the McCarran Amendment of avoiding duplicative and wasteful litigation.

Other factors found significant in *Colorado River* also counsel in favor of dismissal of the federal court proceeding below: (a) when the motion to dismiss the federal court litigation was made, no meaningful deliberations had occurred in the federal court (both the state and federal proceedings were in their infancy); (b) significant involvement of state water rights existed in the state adjudication proceeding; (c) the federal district court is 279 miles from the Klamath County administrative forum, and (4) the federal government had a history of participating in state water proceedings in Oregon with some 4,000 state filings to date. Thus, consideration of the factors of *Colorado River* clearly indicates that the motion to dismiss the federal proceedings below should have been granted. In ruling to the contrary, both the district court and the Ninth Circuit Court of Appeals were in error.

**B. The decision below is adverse to the interests of sound public policy.**

The implications of the Ninth Circuit's ruling in this case could reach well beyond the specific adjudication proceeding involved below. The case represents a depar-

ture from the principles laid down by this Court in *Colorado River* and would thus encourage the wasteful and duplicative litigation which Congress and this Court, for so many years, have sought to avoid.

Of particular concern to the *amici* states is the standard of review employed by the Ninth Circuit in affirming the district court's exercise of jurisdiction. At one point, the Ninth Circuit stated:

> "In the present case, therefore, we will not set aside the district court's decision to exercise its jurisdiction unless we have a definite and firm conviction that the district court committed a clear error of judgment in concluding that exceptional circumstances requiring dismissal were not presented."

Slip opinion at 12. In justifying its decision to uphold the exercise of jurisdiction, the court went on to state that if it were to "erase the district court's careful and time-consuming consideration of . . . this suit" it would, "in effect 'throw the baby out with the bath' " Slip opinion at 13. The court then criticized the state proceedings, describing them as having been "stayed" during the pendency of the federal suit. Slip opinion at 14, 15.

It should first be pointed out that the facts in the present situation are, as demonstrated above, substantially identical to those in *Colorado River*, thus providing the criteria which require dismissal of a federal water right suit in the face of concurrent state proceedings. To require "exceptional circumstances" beyond those specified by this Court is to misapply the *Colorado River* standard.

Second, the *Colorado River* decision requires comparison of state and federal water proceedings at the time a motion to dismiss is filed, not several years later when a case is being considered by an appeals court. Furthermore, the pretrial order in the federal suit below states that non-parties are not bound by the result. These non-parties can argue they have the right to relitigate the legal questions decided by the federal court. There is, therefore, little validity to the claim that overturning the district court's decision against dismissal of the federal proceeding amounts to "throwing the baby out with the bath" since the issues decided by the district court are liable to be relitigated in any case.

Third, there is simply no truth to the idea that the state adjudication proceeding was "stayed" during pendency of the federal suit. The affidavit filed by the Deputy Director of the Oregon Department of Water Resources in support of the Petition for Rehearing before the Ninth Circuit states that Oregon had spent over $900,000 on the state adjudication proceeding and completed 60-65% of the field work pertaining to the use of water for which notices of intent to file claims had been submitted. Additionally, the state had surveyed 180,000 acres of developed irrigated land in the Klamath Basin, half of which was in the Klamath project, and expected to spend another $150,000 in 1984 alone. *See* Affidavit of Chris Wheeler, *supra*.

Because of the number of parties and nature of the property interests involved in adjudication proceedings,

such proceedings are lengthy and complex. Realizing this, Congress sought to expedite these proceedings by enacting the McCarran Amendment. This Court has interpreted the law consistant with this objective. To depart from this interpretation not only makes the process more complex and burdensome, but also injects into general adjudication proceedings the difficulties occasioned by duplicative, needless and piecemeal judicial actions. The *amici* states submit that such a result is adverse to the interests of sound public policy and urge this Court to grant a petition for writ of certiorari to review the Ninth Circuit's decision blow.

## CONCLUSION

In the decision below the Ninth Circuit disregarded the intent of Congress as well as the principles established in numerous decisions by this Court. The decision encourages duplicative and piecemeal litigation. It will hinder rather than facilitate the comprehensive determination of relative water rights through general adjudication proceedings. The decision sanctions a method of dispute resolution which this Court has repeatedly found to be unwise. Because of these implications, the *amici* states urge this Court to grant the petition for writ of certiorari and to reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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## APPENDIX A

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